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ARTICLES

TWO CONCEPTIONS OF JUDICIAL INTEGRITY: TRADITIONAL AND PERFECTIONIST APPROACHES TO ISSUES OF MORALITY AND SOCIAL JUSTICE

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Political theory is a branch of moral philosophy, which starts from the discovery, or application, of moral notions in the sphere of political relations.

—Isaiah Berlin[1]

I. INTRODUCTION: TWO CONCEPTIONS OF JUDICIAL INTEGRITY

Two radically different conceptions of judicial integrity in resolving cases that present controversial moral issues of liberty and equality have vied for preeminence in American jurisprudence for half a century. Traditional jurists contend that the positive law is itself systemically moral and that judges can and should decide all cases—including those that present controversial moral issues of liberty and equality—within the constraints of the standards, rules, and precedents in the positive law. Jurists who adopt Ronald Dworkin's perfectionist view[2] of "law as integ-

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1. ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958), *reprinted in* THE PROPER STUDY OF MANKIND 191, 193 (Henry Hardy ed., 2000).

2. I have adopted the term "perfectionist" from CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 26–39 (2005). For Sunstein, the "perfectionist" legal theorist "believe[s] that the continuing judicial task is to make the [Constitution] as good as it can be by interpreting its broad terms in a way that cases its ideals in the best possible light." *Id.* at 32. Sunstein contrasts this theorist with the "minimalist," who is "cautious about undoing the fabric of existing law," and with the "fundamentalist," whose "goal is to return to . . . the views of those who ratified the document." *Id.* at 26, 29. This paper contrasts traditional jurisprudence, which has affinities with both minimalism and originalism, but is neither, with perfectionism.

rity" contend that the Equal Protection Clause and Due Process Clause in the Fourteenth Amendment incorporate comprehensive abstract moral principles of liberty and equality to which the positive law[3] should, but often does not, conform;[4] that judicial opinions based solely on the "conventional" sources in the positive law are merely "backward looking factual reports" that cannot resolve the novel and controversial moral issues presented by legal cases;[5] that it is, in any event, a "category mistake" for judges to resolve moral issues by non-moral techniques;[6] and that judges should, therefore, read the Constitution "morally," i.e., they should construe the principles of liberty and equality in the Constitution in accordance with the community's best construction of the moral requirements of decency and fairness and should implement the true democratic conditions of liberty and equality.[7]

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3. I define the "positive law" as the standard complex of rules, statutes, and case law that american law-making officials have declared to be the law. *See* RONALD DWORKIN, JUSTICE IN ROBES 211 (2006) [hereinafter DWORKIN, JUSTICE].

4. The conception that morality and the positive law have no necessary relationship is deeply embedded in twentieth-century jurisprudence. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 96–98 (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; H.L.A. HART, THE CONCEPT OF LAW 151–53, 181–207 (1961) (describing "law as a means of social control" and acknowledging "the influence of both the accepted social morality and wider moral ideals" on law, but denying any necessary systematic connection between law and morality); *see also* Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1694, 1698 (1998) (claiming that morality and law are "parallel methods of social control" that often overlap but have no "necessary or organic connection" and that "moral issues are only a subset of the normative considerations that are potentially relevant to adjudication" and "can be elided, or recast as issues of interpretation, institutional competence, practical politics, the separation of powers, or stare decisis—or treated as a compelling reason for judicial abstention").

5. *See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 114–17, 225 (describing traditional jurisprudence as mere "conventionalism" and arguing that it cannot provide any justification for the resolution of issues that "have not been settled one way or the other by whatever institutions have conventional authority to decide them"); *see also* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) [hereinafter DWORKIN, FREEDOM'S LAW]; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82–84 (1978) [hereinafter DWORKIN, RIGHTS]; Posner, *supra* note 4, at 1693 (attributing to Dworkin the position that "the standard sources of positive law in our system do not resolve most of the novel issues that judges must decide").

6. Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1728 (1998).

7. DWORKIN, LAW'S EMPIRE, *supra* note 4, at 225. By "traditional jurisprudence," I mean the judging most judges do most of the time when they apply the positive law to the facts of particular cases. *See, e.g.*, Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision-Making*, *in* JUDGES ON JUDGING 76, 78-79 (David M. O'Brien, ed. 2004) (1993) ("[T]here are more or less

In this paper, I take up Dworkin's perfectionist challenge to traditional jurisprudence from a new perspective. I argue that, contrary to Dworkin's assertions, the positive law is not a fortuitously moral set of backward-looking factual reports; nor is traditional jurisprudence inadequate to resolve constitutional issues of liberty and equality. Rather, the positive law of the United States is an organic, self-creating, self-sustaining, and self-correcting—or "autopoietic"[8]—system of publicly enforced legal principles and rights derived from intrinsically moral procedural and substantive principles set out in the founding documents of the United States, primarily the Constitution. And the role of judges, as conceived by the Founders and adhered to by traditional jurists, is to preserve this system, or social compact, as a flourishing entity by preserving, protecting, and defending the positive law, refining and extending it only incrementally as necessitated by the facts of particular cases.

In Dworkin's perfectionist conception of law as integrity, the Bill of Rights is "a network of principles, some extremely concrete, others more abstract, and some of near limitless abstraction."[9] This system is "comprehensive, because it commands both equal concern and basic liberty," which are "the two major sources of claims of individual right."[10] These two great moral concepts are embodied in the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and because "liberty and

objective principles by which the law operates, principles that dictate the reasoning and often the result in most cases."). As a philosophical program, traditional jurisprudence probably comes closest to what Dworkin calls "conventionalism," or legal positivism, but without the philosophical basis attributed to legal positivism by Dworkin and legal positivists like Hart. *See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 114–17, 225; HART, *supra* note 4, at 77–120. Although Dworkin has written that "[t]he political influence of legal positivism [or the theory that a community's law consists only of what its law-making officials have declared to be the law] is no longer an important force either in legal practice or in legal education." DWORKIN, JUSTICE, *supra* note 3, at 211. There remain influential jurists and thinkers who analyze the positive law, including constitutional law, as a body of principles evolving in the context of precedents, standards, and rules. *See, e.g.*, CHARLES FRIED, SAYING WHAT THE LAW IS (2004). I do not attribute to these thinkers, however, the philosophical theory of the grounds of traditional jurisprudence developed in the paper.

8. The term "autopoiesis" is derived from the Greek word for "self-creating." It was coined by biologists Humberto Maturana and Francisco J. Varela to describe living systems, or autonomous and strictly bounded systems that are shaped by their interactions with the environment over time so as to maintain the system and the relations between its parts. H.R. MATURANA & F.J. VARELA, AUTOPOIESIS AND COGNITION 78–79 (1980). I am grateful to John Mixon for drawing my attention to the term "autopoietic."

9. DWORKIN, FREEDOM'S LAW, *supra* note 5, at 73.

10. *Id.*

equality overlap in large part," these two clauses contain all of the fundamental individual rights that incorporate the principles of liberty and equality.[11] Indeed, Dworkin argues, anyone who believes that free and equal citizens would be guaranteed a particular individual right would likely also think the Constitution already contains that right, unless constitutional history has decisively rejected it.[12] "[I]t is very likely," he states, "that, even if there had been no First Amendment, American courts would long ago have found the freedoms of speech, press, and religion in the Fifth and Fourteenth Amendments' guarantees of basic liberty."[13]

Dworkin further argues that because "[o]ur legal culture insists that judges—and finally the justices of the Supreme Court—have the last word about the proper interpretation of the Constitution," and because "the great clauses command simply that government show equal concern and respect for the basic liberties—without specifying in further detail what that means and requires—it falls to judges to declare what equal concern really does require and what the basic liberties really are."[14] Judges should, therefore, interpret the constitutional principles of liberty and equality "on the understanding that they invoke moral principles about political decency and justice,"[15] recognizing that "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[16] Dworkin acknowledges his theory entails "that judges must answer intractable, controversial, and profound questions of political morality" and that "the rest of us must accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special"[17] and that this consequence "seems unfair, even frightening" and "seems to give judges almost incredible power."[18] However, he argues this method of deciding morally controversial cases is justified because it best realizes the true moral content of the Constitution.[19]

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 74.
15. *Id.* at 2.
16. *See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 225; *see also* DWORKIN, FREEDOM'S LAW, *supra* note 5, at 94–96, 114–20, 254–58.
17. DWORKIN, FREEDOM'S LAW, *supra* note 5, at 74.
18. *Id.*
19. *See id.* at 343 ("The great constitutional clauses set out extremely abstract moral principles that must be interpreted before they can be applied,

On the traditionalist view developed below, the substantive rights in the Constitution do not collapse into comprehensive basic principles of liberty and equality that judges are free to define for society and implement to ensure true democratic conditions. Rather, the positive law consists of an organic body of intrinsically moral substantive and procedural principles and rights with the Constitution at its apex. The traditional process of rational legal decision making from those principles in accordance with the plain language of the Constitution, precedent, and the facts of particular cases is likewise moral; and that process can resolve even the most morally controversial social issues presented by legal cases while preserving the moral integrity of the law itself. Indeed, on this view, judicial integrity consists precisely in a judge's adhering to the positive law, and not in his importing into the law the "best constructive interpretation of the community's legal practice" based on his independent understanding of the rational requirements of abstract moral principle.[20] Not only is it unnecessary for judges to read the Constitution morally to resolve cases that present constitutional issues of liberty and equality, but judges who do so necessarily contravene the moral and legal structure of the Constitution itself and its procedurally and substantively moral directives.

The traditionalist conception of judicial integrity as judicial restraint and Dworkin's conception of "law as integrity" are thus diametrically opposed. How these opposing views are philosophically justified, how they operate in actual judicial decision making, how they have shaped modern American rights-based jurisprudence, and what their use portends for future jurisprudence and social governance are the subject of this paper. I conclude that traditional jurisprudence better protects the moral conditions of a just democratic society.

II. MORALITY AND LAW

Both traditional judges, who interpret the Constitution in light of its plain language and the strict rules and precedents in the positive law, and judges who read the Constitution morally, and thus assume a normative role in assuring that the law reflects the true moral conditions of a democratic society, agree that a just society is a moral society, or one whose laws are intrinsically moral and one in which the implementation of the law is fair to all. But traditional judges faced with resolving cases that present

and any interpretation will commit the interpreter to answers to fundamental questions of political morality and philosophy.").

20. *See supra* text accompanying note 7.

controversial moral issues would argue that their task as judges is to preserve the morality built into the law while refusing to enforce laws or promulgate rules of law that do not conform to that embedded morality, while judges who read the Constitution morally would deny that the positive law is intrinsically moral and capable of resolving moral issues. They would argue that moral issues presented by legal cases can "truly" be resolved only by judicial recourse to the philosophically best construction of moral principle. Therefore, a defense of the claim that traditional jurisprudence preserves morality embedded in the law must begin with a defense of the claims that the positive law is intrinsically moral and that traditional judicial decision making is itself a moral process that is capable of producing morally sound decisions. I begin, therefore, with the concept of morality.

A. *Intrinsic Morality and Law*

I take as fundamental the axiom that moral value inheres intrinsically in life itself, and I define morality categorically as the complex of moral interests, rights, principles, and decisions that derives from and entails recognition of, and respect for, the *intrinsic value of human life.* This view is shared by Dworkin, who has stated that "we almost all accept [the premise] that human life in all its forms is sacred—that it has intrinsic and objective value quite apart from any value it might have to the person whose life it is" and who likewise takes "the abstract right to concern and respect . . . to be fundamental and axiomatic."[21]

I further take it to be axiomatic that the governing laws of a society are moral—and not merely a "means of social control" with no necessary connection to morality[22]—precisely insofar as they incorporate procedural and substantive principles and rights that recognize and respect the intrinsic dignity and worth of each member of society. This is also Dworkin's governing precept, with the caveat that Dworkin does not agree the positive law of the United States is intrinsically moral and kept moral by the operation of the system itself. Rather, Dworkin's "law as integrity" is justified precisely because it implements the "true" governing principles and rights of a moral democratic society from outside the positive law that lacks them.[23] Thus, my counterclaim requires an argument, and again I begin as Dworkin does—with rights.

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21. Ronald Dworkin, *Life is Sacred. That's the Easy Part,* N.Y. TIMES MAG., May 16, 1993, at 36; *see also* DWORKIN, FREEDOM'S LAW, *supra* note 5, at 84.

22. *See* HART, *supra* note 4, at 151.

23. *See* DWORKIN, FREEDOM'S LAW, *supra* note 5, at 21–27.

B. *Abstract Moral and Legal Reasoning*

If morality is understood as respect for the intrinsic dignity and worth of every human being, it rationally follows that all human beings have *moral interests*, i.e., they all possess dignity and the abstract right to be treated with respect, both substantively and procedurally.[24] Thus, in Kantian terms, treating human beings as lacking intrinsic worth—treating them as mere objects or commodities without moral interests worthy of respect—is categorically inconsistent with morality.[25] Moreover, because there is nothing in the concept of morality itself to distinguish a moral interest, or right to respect, in one person from the same interest in another person, moral reasoning requires that all equal moral interests be treated *equally*, or that the moral interests of every person affected by a moral choice be treated as equal to those of every other similarly situated person. I take this aspect of rational moral theory to be undisputed. But procedural equality is not the only essential attribute of moral reason.

As each moral agent is both an autonomous actor in making moral decisions and an object of the moral decisions made by himself and others, morality as respect for the intrinsic dignity and worth of every person rationally implies not only equal respect for equal moral interests, whoever possesses them, but also respect for the equal *moral autonomy*, or *personal liberty*, of each person as both agent and object of moral choices. In other words, morality as respect for the equal individual dignity and worth of every person requires that all moral agents respect the right of each moral agent to determine for himself how the dignity and worth of each person affected by his decision would be best respected, assuming he himself were to be in any of the positions subject to his own decision. Thus, each rational moral agent must make his moral decisions as if he were to be subject to his own decisions and were to have the same respect for the moral interests, or *rights*[26] and *liberties*,[27] of others as for his own.

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24. *See* DWORKIN, RIGHTS, *supra* note 5, at xv.

25. Indeed, this Kantian concept of persons as "ends in themselves" may be taken as the core insight in modern moral theory, and it is certainly the core insight in modern deontological moral and political theory. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 9, 46–49 (Robert Paul Wolff ed., Lewis White Beck trans., Bobbs-Merrill 1959) (1785). Kant, however, locates intrinsic value in reason, that is, in an absolutely good will, rather than in the anterior ground of life itself. *Id.* at 9.

26. *Black's Law Dictionary* defines the concept of "right" in terms both moral and legal:

> Right. As a noun, and taken in an *abstract* sense, means justice, ethical correctness, or consonance with the rules of law or the principles of morals. In this signification it answers to one meaning of the Latin

Rational moral decision making thus requires us to recognize that all persons whose interests are affected by our choices place demands upon our moral consideration: they have moral interests that are assimilable to abstract moral rights or liberties equally inhering in all similarly situated persons. Those rights, in turn, correlate with moral principles we recognize as rules of moral decision making generally applicable to all similarly situated persons. Because each person is equally entitled to respect as both moral agent and the object of moral choice, and because moral rights inhere in similarly situated persons of equal intrinsic moral worth, moral reason itself requires that the equal interests of affected persons be treated equally under equal circumstances and also that the law be made in such a way that each moral agent, reasoning morally, would willingly subject himself to it. Because this abstract model of moral reasoning respects the equality and liberty of all persons as both agents and objects of moral decision making, it is intrinsically both moral and *democratic*, and to the extent a moral decision is reached logically the decision is both *rational* and *procedurally fair.*

"*jus*," and serves to indicate law in the abstract, considered as the foundation of all rights, or the complex of underlying moral principles which impart the character of justice to all positive law, or give it an ethical content. As a noun, and taken in a *concrete* sense, a power, privilege, faculty, or demand, inherent in one person and incident upon another. . . .

As an adjective, the term "right" means just, morally correct, consonant with ethical principles or rules of positive law. It is the opposite of wrong, unjust, illegal.

A power, privilege, or immunity guaranteed under a constitution, statutes or decisional laws, or claimed as a result of long usage.

BLACK'S LAW DICTIONARY 1189 (5th ed. 1979).

27. *See* KANT, *supra* note 25, at 54–57. *Black's Law Dictionary* likewise also defines "liberty" in both moral and legal terms:

Liberty. Freedom; exemption from extraneous control. Freedom from all restraints except such as are justly imposed by law. Freedom from restraint, under conditions essential to the equal enjoyment of the same right by others; freedom regulated by law. . . .

The power of the will to follow the dictates of its unrestricted choice, and to direct the external acts of the individual without restraint, coercion, or control from other persons.

The word "liberty" includes and comprehends all personal rights and their enjoyment.

BLACK'S LAW DICTIONARY, *supra* note 26, at 827. The word "liberty" as used in the state and federal constitutions means, in a *negative* sense, freedom from restraint, but in a *positive* sense, it involves the idea of freedom secured by the imposition of restraint, and it is in this positive sense that the state, in the exercise of its police powers, promotes the freedom of all by the imposition upon particular persons of restraints which are deemed necessary for the general welfare.

Both moral philosophers and traditional and perfectionist judges, I believe, can agree that moral reasoning incorporates the foregoing principles. Indeed, the model of moral reason I have described merely reflects the Kantian categorical imperative of moral reason.[28] I further contend, however, that the model applies not only to moral reasoning but also to the process of fair and rational *legal* reasoning in accordance with the constitutional principles of equality and due process, i.e., legal reason is a type of practical moral reason. Indeed, the essential attribute of moral reasoning that every person affected by a moral decision be treated the same as every other similarly situated person may be taken as the core of the concept of *procedural equality* embodied in the Equal Protection Clause of the Fourteenth Amendment.[29] Likewise, the respect due each person as both the maker and the object of moral choices may be taken as the essential moral core of the concept of *procedural liberty* or *due process* that underlies the Due Process Clause of the Fifth[30] and Fourteenth Amendments.[31] But nothing I have said so far tells us how a moral agent, or a judge, can rationally determine whether a *procedurally* rational and fair decision is *substantively* fair, or the "best" that can be made in a given set of empirical circumstances. That is,

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28. *See* KANT, *supra* note 25, at 39, 45–59.

29. The Fourteenth Amendment provides, in relevant part,

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. . . . Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5; *see* Reynolds v. Sims, 377 U.S. 533, 565 (1964) ("[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.").

30. The Fifth Amendment provides, inter alia, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V, § 1.

31. *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937) ("[T]he liberty safeguarded [by due process] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfares of the people. . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."). *But see* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (declaring that liberty under law extends to the full range of conduct the individual is free to pursue, which may not be restricted except for proper governmental purpose). *See generally* KANT, *supra* note 25, at 51–52 (describing moral agents as universal legislators in a world of ends).

nothing I have said so far tells us what *practical judgment* should follow on abstract moral or legal reasoning.

C. *Practical Moral and Legal Judgment*

Essential to the understanding of empirical fairness—but lost to perfectionist moral and political philosophy—is the recognition that practical moral judgment cannot be reduced to the rational application of universal abstract moral principles irrespective of empirical circumstances without consequences for both abstract and empirical fairness. Unlike abstract moral reasoning, practical moral judgments are, by definition, made under empirical conditions. Thus, they have substantive content; they affect real people under real empirical circumstances; and, because they are empirical applications of principle and instantiate empirical rights, they are subject to empirical constraints that must be recognized and fairly and rationally accomodated to maintain the morality of any applied, or practical, social system.

First, no substantive moral principles or rights, despite their abstract universal form, are applicable in all empirical circumstances. Rather, in any given area of practical moral concern under empirical conditions, only certain substantive moral principles and their correlative rights apply, i.e., applied moral principles have empirical boundaries. Second, persons in different empirical positions are not affected the same way by a practical moral choice; their implicated moral interests are different because their positions are not only abstractly but factually different and because some factual considerations are more relevant in a given context than others, i.e., some facts are material to the practical decision-making process while others are not. Third, practical moral decisions are made under imperfect conditions of knowledge, both as to all relevant facts and principles and as to the full empirical consequences of alternative choices, so that a practical moral choice cannot be known to be objectively or necessarily "true" or the objectively "best" moral choice among all possible choices that could be made.

Fourth, and finally, in empirical conditions, the moral interests of those persons who will be affected by a moral choice may conflict with each other and with other interests, generating an empirical moral nexus in which one interest may be satisfied by the rational moral agent only at the expense of another and entailing the need for an evaluative process, or method of practical moral judgment, by which a rational and fair moral agent can weigh empirical alternatives and resolve conflicts among the possible empirical outcomes of his choice by deciding which princi-

ple is more fundamental and should be enforced and its correlative rights instantiated. Thus, practical moral judgment requires a means for determining the relative weights of rights whose instantiation is sought, that is, it requires a means of evaluation to determine the better, and ultimately best, result.

I submit that unless some external authoritative source determines that one right is necessarily more fundamental, or weightier, than another in given circumstances, the process of repeated comparisons of rights against each other itself prescribes which rights are weightier in which types of situations. Thus the process of repeatedly making rational practical moral judgments creates a hierarchy of rights in which fundamental substantive moral rights or liberties are simply those intrinsically moral rights that, when weighed by a moral agent against other applicable vested rights, or interests, dominate and determine the outcome of moral judgments in case after case, either because the substantive interests they instantiate are broader or because they are deemed most critical. Over time, substantive rights that are reinforced as weightier in situation after situation or in the most critical situations become enshrined in the moral life of a person, or indeed of a community, as virtually objective correlatives to fundamental substantive moral principles.

A choice made according to principles of moral reason gives logical priority to more fundamental principles over lesser ones and instantiates those rights which, when compared against the alternatives, are, in the moral agent's considered view, the weightiest, or the most conducive to the furthering of the moral interests of all affected persons under the circumstances, and thus most conducive to beneficence or the good. Given the moral, rational, and empirical constraints on practical moral choice, the "best" or "moral" decision among actual empirical alternatives is that decision to which the rational moral agent would willingly subject himself as best if he were in any of the positions affected by his own decision when he rationally compares the available alternatives in light of the material facts, the hierarchy of applicable governing principles, and the foreseeable consequences. Thus, the ultimate moral and rational justification for any practical moral choice, or applied moral judgment, relative to the alternatives, is its tendency to best preserve and further the interests of human dignity and worth overall under the applicable circumstances in the judgment of the rational moral agent who perceives himself as potentially subject to his own decision and who treats all affected persons as he would treat himself were he to occupy any of their positions.

On this view, a rational moral agent is an autonomous participant in the implementation of moral choices that affect himself and others, and he is bound by reason and morality to treat equal moral interests, or rights and liberties, as equally worthy of respect, whether in himself or others, and to apply the same process of rational moral reasoning and moral judgment in every situation implicating moral concerns, taking into account the operative procedural and substantive principles, the facts, and the relative weight of the rights whose instantiation is sought. When the substantive principles followed and the rights instantiated are intrinsically moral and rationally judged most conducive to the good, the outcomes the process produces are themselves intrinsically rational and moral, and the living moral system to which such judgments contribute is kept fair insofar as the process is followed, i.e., insofar as the moral agent acts both rationally and morally. Repeated rational moral judgments thus create a personal moral code that is self-creating and self-correcting and that is instantiated by individual, intrinsically-moral substantive judgments made in accordance with the abstract principles of moral reason and moral judgment, ensuring both procedural and substantive fairness.

I submit that, just as abstract legal reason has the same form as abstract moral reason, so rational, moral legal judgment has the same form as practical, or applied, moral judgment. Specifically, in making a rational and moral legal decision, the judge begins with the facts and the legal principles applicable to the case, applies the rules and standards in the law, and reasons logically from the law as applied to the facts to the conclusion, instantiating that alternative which best realizes the values in the positive law and maintains the coherence of the whole. Thus, insofar as a legal system, or code, is substantively moral, the judgments made by judges within the legal system in accordance with intrinsically moral processes of legal reasoning will themselves be intrinsically moral and will contribute to the integrity of the whole as part of a living, organic, intrinsically moral system, and laws and judgments not in accordance with those principles will be rejected. Correspondingly, if a legal system is not systemically moral, but incorporates principles that conflict with the requirements of procedural and substantive morality, the moral integrity of the system and its judges can be maintained only by judges invalidating the offending laws from outside the system by following truly moral principles and instantiating truly moral rights. That, of course, is the dilemma addressed by Dworkin, which is based upon the assumptions that the government and laws of the United States are not systemically moral, that they do not self-

correct, and that both law and society cannot be made "truly" moral unless they are made to conform to abstract philosophic conceptions of morality and justice as independently understood by judges. Traditional jurisprudence is defensible, therefore, only if Dworkin's assumptions are wrong. The question is how we can know that the American legal system is moral and how it is systematically kept moral by its own operation so that judges who decide cases within the positive law are justified in believing that the body of law to which their opinions contribute is moral, and that by following and contributing to that law they maintain its—and their—moral integrity.

III. The Moral Integrity of the Positive Law

I submit—and I believe perfectionists would agree—that an actual representative democracy that is governed by a set of intrinsically moral substantive and procedural principles, or laws, that respect the intrinsic liberty and equality of all is a moral society. The question is how that society is achieved, In my view, the essential difference between an individual moral code and a moral society in the form of a constitutional representative democracy is merely that, in such a democracy, the general laws that affect all on the social plane are made communally by elected representatives of all for all, rather than by individuals for themselves; the votes for and of the elected representatives are of equal weight and are aggregated by an impartial principle of aggregation; and the laws made by those representatives are enforced by all against all in furtherance of the common good as the people collectively perceive it. Should the aggregating principle in electing representatives and promulgating legislation be the one-person, one-vote principle coupled with majority rule, the resulting institutions and laws will be both intrinsically *moral* and intrinsically *democratic* in that they will respect the equal moral autonomy and worth of each person in electing representatives and in making the laws for themselves through those elected representatives.

I maintain that the positive law of the United States is just such an intrinsically moral, organic, self-sustaining—or autopoietic—system and that the American social compact consists in the ongoing process of generation and implementation on the social plane, by the American people, through their representatives, and for their own governance, of those intrinsically moral substantive and procedural laws they themselves have collectively deemed to be most conducive to their own common good. The body of the positive law that implements the provisions in the

Constitution has systemic moral integrity because the Constitution, like the other founding documents of the United States, is itself a morally sound document; the laws subordinate to it are kept morally sound by their conformity to it; and the ongoing interpretation of the law by impartial judges in accordance with rule, precedent, and the facts of particular cases produces an organic, incrementally evolving, body of law that is systemically moral, self-creating, and self-correcting.

That the organizing principles and enabling laws of the United States government are intrinsically moral is evident from an examination of its foundational documents.

The Declaration of Independence justified separation from the British crown and the formation of a new government on the grounds that

> all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness, [t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, [and] [t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[32]

The American Constitution, in turn, proclaimed that the government of the United States was expressly ordained and established by the representatives of the people "in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general wel-

32. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This conception of a just society manifests the influence of Locke's theory of the social compact as an agreement of free people to give up their freedom to act individually in order to better preserve their lives, liberty, and property and to further "the peace, safety and public good" as they themselves define it, and the agreement of the Founders that decisions affecting the whole be taken by the whole on a democratic basis. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 68 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) ("[M]en, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature . . . only with an intention in every one the better to preserve himself, his liberty and property . . . . And so whoever has the legislative or supreme power of any common-wealth, is bound to govern by established *standing laws,* promulgated and known to the people, and not by extemporary decrees; by *indifferent* and upright *judges,* who are to decide controversies by those laws . . . . And all this to be directed to no other *end,* but the *peace, safety,* and *public good* of the people.").

fare, and secure the blessings of liberty to ourselves and our posterity."[33] And, in *Marbury v. Madison*, Chief Justice Marshall reaffirmed the "original right" of the people to establish a government subject to those principles they deemed most conducive to their own collective happiness, stating:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.[34]

The American social compact is thus consciously founded on a moral base, namely, the "original right" of free people to establish for themselves a government of those laws they deem most conducive to their own safety and happiness.[35] And the supreme instrument for protecting and furthering that ideal is the Constitution, which was drafted by delegates of the people for their own governance and approved by the people through ratification by the states, and which incorporates those intrinsically moral, procedural, and substantive constraints on personal liberty and the exercise of the power of the State that were, in the estimation of the Framers and the states which adopted the Constitution, vital to the preservation and rational furtherance of the common good.

The Constitution sets out the Founders' and their successors' conception of the fundamental enabling principles of a just society.[36] Drafted by delegates of the people and approved by the people, the Constitution assures the people's ultimate determi-

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33. U.S. CONST. pmbl.

34. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (emphasis added); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403–05 (1819).

35. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 60 (1971) (arguing that ideal representative persons behind a veil of ignorance as to their future position in society would choose as principles of a just society his two principles of "fairness," namely (1) the principle that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others," and (2) the principle that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all").

36. *See McCulloch*, 17 U.S. (4 Wheat.) at 405–07 ("[The Constitution's] nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea

nation of, and responsibility for, the moral and political justness of the law, both substantively and procedurally.[37] In addition to the original moral and political right of self-government, the amendments to the Constitution enumerate fundamental *substantive* moral principles, according rights to all, inter alia, to associate freely with others, to practice religion freely, to speak freely, and to possess their persons, homes, and property without fear of arbitrary governmental intrusion. The Ninth and Tenth amendments, more abstractly, ensure the substantive personal liberties traditionally held by the people against intrusion by the State.[38]

Finally, and most abstractly, the Fifth and Fourteenth Amendments incorporate the two great democratic moral principles of liberty and equality as procedural constitutional requirements of all legal decision-making, whether by judges or by legislatures, assuring fundamental procedural fairness in the making of laws and the rendering of judicial opinions.[39] But these two amendments do not, by anything in their express language, override or subsume the constitutional principles guaranteeing substantive rights and liberties; nor do they have express

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was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.").

37. *See id.* at 403–05 (noting that the Constitution was promulgated by a convention of delegates elected by state legislatures and was submitted for ratification to conventions of delegates "chosen in each state by the people thereof").

> From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established," in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." . . .
>
> . . . The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

Id.

38. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

39. *See* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (recognizing that concepts of equal protection of laws and due process both stem from the American ideal of fairness); Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (holding that equal protection and due process both stem from the American ideal of fairness).

substantive moral content of their own. Rather, the Fourteenth Amendment expressly reserves to Congress, not to the courts, the "power to enforce, by appropriate legislation, the provisions of this article,"[40] just as the Tenth Amendment assures to state legislatures the "police power" that protects the public health, safety, welfare, and morals.[41]

The Constitution, as designed, provides *substantive* moral principles that act as constraints in intrinsically moral areas of concern, and it provides intrinsically moral *procedural* principles for use in every case of legal decision making, and these together ensure that the positive law is kept moral. While these substantive and procedural constitutional principles are supreme, they are in no sense independent of the body of the law they structure and guide, but are one with it; nor are any of the parts of the system dispensable. Rather, the Constitution constitutes the essential structural document of the living social compact originally agreed upon by the Founders and continually ratified by Americans for their own governance ever since, namely a compact consisting in a hierarchy of agreed upon, evolving, procedural and substantive laws incorporating the values of the American people and according legal rights to them, with the Constitution and its constraints and liberties at its apex.[42]

Within the political system the Constitution creates, the positive law is made both by case law building on prior case law and by representative legislative assemblies elected by the people on a

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40. U.S. CONST. amend. XIV, § 5.

41. U.S. CONST. amend. VII. The "police power" is

> [a]n authority conferred . . . in the Tenth Amendment . . . upon the individual states . . . through which they are enabled to . . . place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity. The police power is subject to limitations of the federal and State constitutions, and especially to the requirement of due process.

BLACK'S LAW DICTIONARY, *supra* note 26, at 1041.

42. As explained in *The Federalist*,

> A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution to be preferred to the statute, the intention of the people to the intention of their agents.

THE FEDERALIST No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

one-person, one-vote basis,[43] usually using as the aggregating principle of decisions applicable to the whole the principle of majority vote.[44] Both case law and statutes are then interpreted by judges in accordance with precedent, standards, and rules. Within this framework, constitutional principles trump statutes, which, in turn, trump case law interpreting the common law,[45]

43. While the conception of legislatures as elected representatives of the people was in the Constitution from the beginning, the conception of one-person, one-vote as the expression of equality under the law has developed gradually. *See, e.g.*, U.S. CONST. art. I, §§ 1, 2, 3; U.S. CONST. art. IV, § 4; U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XVII, § 1; U.S. CONST. amend. XIX, § 1; Reynolds v. Sims, 377 U.S. 533, 568 (1964) (concluding that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators).

44. The majoritarian premise stems from Locke's and the Framers' conception that, to act as one, a community formed by the consent of free people should be carried by the will of the majority. Locke makes the following argument:

> § 96. For when any number of men have, by the consent of every individual, made a *community*, they have thereby made that *community* one body, with a power to act as one body, which is only by the will and determination of the *majority*: for that which acts any community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the body should move that way whither the greater force carries it, which is the *consent of the majority*: or else it is impossible it should act or continue one body, *one community*, which the consent of every individual that united into it, agreed that it should; and so every one is bound by that consent to be concluded by the *majority*. And therefore we see, that in assemblies, impowered to act by positive laws, where no number is set by that positive law which impowers them, the *act of the majority* passes for the act of the whole, and of course determines, as having, by the law of nature and reason, the power of the whole.

LOCKE, *supra* note 32, at 52.

45. This hierarchy is ancient, as observed by Sir Matthew Hale, the classic authority on the origin of the common law. Hale states:

> [T]ho' by Virtue of the Laws of this Realm [judge-made laws] do bind, as a Law between the Parties thereto, as to the particular Case in Question, 'till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever.

SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (Charles M. Gray ed., Univ. of Chi. Press 1971) (1713). Likewise, Sir Edward Coke distinguished judicial decisions as inferior in status to statutes and statutes as inferior to Magna Carta and to the Charta de Foresta, which would evolve into the unwritten English constitution. *See* 1 Sir EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND A9–10 (Omni Publ'ns 1998)

with all being ever subject to change through constitutional amendment, statutory enactment, amendment, revocation, and judicial interpretation. And it is to this living, self-creating, self-correcting, intrinsically moral social compact that the traditional conception of the integrity of the positive law and of judges responds.

IV. JUDICIAL INTEGRITY IN CONSTRUING THE POSITIVE LAW

Within the intrinsically moral American legal system, the role of the judge as traditionally understood is both rational and moral. Judicial decision making determines, adjusts, and enforces the rights of parties in particular cases to a beneficent end by applying constitutional, statutory, and common-law principles, as appropriate, to the facts of particular cases to determine the enforceable rights of parties and, going forward, the rights of those future litigants who are similarly situated. In making a legal judgment in a case or controversy, a traditional judge (or panel of judges) begins with the empirical facts and the relevant positive law—principles that have substantive moral content. The judge considers the material facts of the case as presented by the record in light of the relevant substantive legal principles and precedent, and, using prescribed, intrinsically moral rules and standards, he rationally determines the legal rights of the parties and enters that judgment which best furthers the integrity of the law within those constraints.

The traditional judge applies the same laws and the same process of judicial decision making to all persons, treats all similarly situated persons alike, and treats constitutional rights or liberties, as construed over time, as more fundamental than statutory or common law rights, according procedural and substantive fairness to those whose rights are affected by the judgment, and reaches a conclusion that, ideally, is both logically valid and empirically sound under the positive law. He then distinguishes the losing arguments, if colorably valid, and shows where they went wrong. When the answer to a legal problem is not clear-cut—as when a constitutional provision or statute contains language that is subject to different interpretations, or the case law is unsettled, or the case presents an issue of first impression—he consults precedent and applicable rules of procedure and construction to determine which outcome is most consistent with maintaining the integrity of the law. When this process of

(1797). Moral principles are embedded in all these sources of the common law. *See* HALE, *supra*, at 144–45 (setting out constituents of common law); *see also* COKE, *supra*, at A5, A6, A9–10.

legal reasoning is applied, new cases are judged by their coherence with, and positive contribution to, a body of law that is both procedurally and substantively fair.

Because the positive law is an *empirical* system, it is both open-ended and *indeterminate* and imperfect. Not only do the laws and facts deemed relevant differ from case to case, but rational and moral judges may use different interpretive techniques, weigh outcomes differently, or err.[46] But the positive law is not, therefore, only fortuitously moral and rational; rather, it is systemically self-creating, self-sustaining, and self-correcting. Within this system, judicial opinions constrain both each other and the construction and scope of general laws, maintaining systemic integrity. Judge-made law, or case law, is incorporated into a flexible body of positive law that grows and changes incrementally. It gives way, however, to statutory law when the need for a uniform general law arises, and both case law and statutory law are constrained to conform to more fundamental constitutional principles, all being subject to ongoing refinement by judicial decisions in particular cases that are kept uniform through adherence to "strict rules and precedents."[47] Traditional jurisprudence thus acts as a force for flexibility, stability, and progress in the law and as a check on any tendency in the judiciary to reach beyond the bounds of interpretation to become legislators, or makers of general laws. And adherence to traditional judicial decision making within the framework of the positive law provides a basis for a judge's belief that in making the decision required by law he is himself acting morally, or with integrity, to preserve and contribute to a system of laws that is itself just. Indeed, the integrity of the system depends upon the shared expectation that law-makers and judges will play by the rules of the game, i.e., they will follow the standard rules and precedents

46. Judicial strategies for deciding cases and methods of statutory and constitutional construction clearly vary and have been the subjects of entire schools of jurisprudence. *See, e.g.*, Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457 (2003) (distinguishing four types of judicial decision-making: traditional, political, strategic, and litigant-driven); Timothy P. Terrell, *Statutory Epistemology: Mapping the Interpretation Debate*, 53 EMORY L.J. 523 (2004) (rejecting the notion that there is a "right" way to interpret statutes); *see also* SUNSTEIN, *supra* note 2.

47. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 42, at 471; *see also id.* at 465–67 ("[T]he courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law.").

produced by the system itself and will not change the rules to fit their own conception of morality.

Dworkin's objectivist conception of "law as integrity" is radically different. Starting from the assumption that the positive law is *not* intrinsically moral, except insofar as it conforms to the best philosophical interpretation of the rational requirements of "the two major claims of equal concern and basic liberty" in the Equal Protection and Due Process Clauses, Dworkin contends that "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[48] Judges of integrity are not bound by precedent and rule, but are committed to telling "an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future," just as literary critics "teas[e] out the various dimensions of value in a complex play or poem," or "a group of novelists writes a novel *seriatim*," each writing his chapter "so as to make the novel being constructed the best it can be."[49] A judge who, in deciding cases, construes and enforces the principles of liberty and equality in the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment in accordance with the best constructive interpretation of the community's practice participates in constructing the conditions of the truly democratic and just society.

Unlike traditional jurisprudence, Dworkin's perfectionist jurisprudence is a teleological, or end-based, jurisprudence in which the abstract principles of liberty and equality, as interpreted by judges bound only by reason and their best constructive moral judgment, determine the just result in legal cases and thus implement the "true" principles of a just society. The result of this reasoning directly from abstract principles of justice to empirical propositions of law philosophically determined to be true is not a strictly construed decision on the law and the facts of a particular case that contributes incrementally to the positive law, but a general substantive law that trumps any inconsistent positive laws made by the people themselves or by past case law in accordance with the actual moral values of the people, even if those laws are consistent with the express language and historical interpretation of the Constitution. In this jurisprudence, the courts, and not the people, become the moral arbiters of society

48. DWORKIN, FREEDOM'S LAW, *supra* note 5, at 225.
49. *Id.* at 227–29.

and the guarantors of social, as well as individual, justice. They, and not the people, are the moral law-makers.

The distinction between perfectionist and traditional jurisprudence is not merely academic. These two methods of judicial decision-making have vied to shape the legal landscape with respect to morality and social justice for the last half century.

V. THE PERFECTIONIST CONSTRUCTION OF CONSTITUTIONAL EQUALITY

Dworkin views *Brown v. Board of Education* as the case that introduced the moral reading of the Constitution into Supreme Court jurisprudence.[50] I agree.

Brown represents the Supreme Court's judgment on a set of consolidated cases from several states premised on different facts and local conditions, but all presenting a single legal question: whether the segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors were equal, deprived the children of the minority group of equal educational opportunities in violation of the Fourteenth Amendment.[51] All of the plaintiff children had been denied relief under the "separate-but-equal" doctrine established almost sixty years earlier in *Plessy v. Ferguson*,[52] in which the Supreme Court had held that equal treatment was accorded when the races were provided substantially equal, if separate, transportation facilities.[53]

The Supreme Court began its analysis in *Brown* by looking to *The Slaughter-House Cases* and *Strauder v. West Virginia*, in which it had construed the Fourteenth Amendment in the 1870s to

> contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[54]

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50. Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see* DWORKIN, RIGHTS, *supra* note 5, at 26–27.

51. *Brown*, 347 U.S. at 486–88, 493.

52. Plessy v. Ferguson, 163 U.S. 537 (1896).

53. *See Brown*, 347 U.S. at 488.

54. Strauder v. West Virginia, 100 U.S. 303, 307–08 (1879); *see also In re* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67–72 (1873).

The Court opined, however, that despite these early cases recognizing a substantive legal right of African Americans not to be discriminated against on racial grounds, it could not determine with any certainty what Congress had in mind in 1868 when it enacted the Fourteenth Amendment.[55]

The Court then examined the history of cases construing the Fourteenth Amendment. It observed that initially the amendment had been interpreted as proscribing all state-imposed discrimination against blacks, and that in more recent public education cases the Court had found the benefits enjoyed by white and black students to be unequal, but it had not reexamined the separate-but-equal doctrine.[56] The Court did not rely on the jurisprudence developed with respect to racial inequality in education as applied to the facts of the case, however. Instead, it took the path it had explicitly refused to take in *Sweatt v. Painter*, its then most recent case dealing with racial segregation in education.[57]

Rather than deciding the issue before it by construing the plain language of the Equal Protection Clause in light of evolving precedent with respect to the personal rights of the plaintiff classes and the evidence of their unequal educational opportunity under the challenged segregation laws, the Court focused on the

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55. *Brown*, 347 U.S. at 489.

56. *See id.* at 490–92; *see also* Sweatt v. Painter, 339 U.S. 629, 635–36 (1950) (holding that under the Equal Protection Clause, qualified black law school applicant had personal right to legal education equivalent to that offered by state to students of other races; educational opportunities offered white and black law students by state were not substantially equal; and the Equal Protection Clause required the admission of applicant to regular university law school); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950) (holding that a black doctoral student who was admitted to a state-supported graduate school and assigned to a special seat reserved for blacks in the classroom, library, and cafeteria was deprived of personal right to equal protection; and "under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race"); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631, 632–33 (1948) (holding the Equal Protection Clause of the Fourteenth Amendment required the state to provide a qualified black applicant with legal education afforded by state institution as soon as for applicants of other groups and, where admission was denied solely because of color, mandamus would lie to compel admission); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938) (holding the Equal Protection Clause required state to afford black resident a substantially equal opportunity for a legal education as the state did for white, regardless of whether other blacks sought the same opportunity).

57. In *Sweatt*, the Supreme Court stated that although "[b]roader issues have been urged for our consideration . . . we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court." *Sweatt*, 339 U.S. at 631.

fact that in each of the consolidated cases schools that were clearly unequal were being equalized "with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[58] It determined, therefore, that its decision could not turn on "these tangible factors in the Negro and white schools involved in each of the cases" but must turn, instead, on "the effect of segregation itself on public education."[59] Thus, the Court asked whether there could be such a thing as intrinsic inequality when tangible factors were equal and determined, on the basis of expert psychological and sociological treatises evaluating the general effects of segregation, that the separate-but-equal doctrine had no place in public education. It concluded that "the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[60]

Dworkin endorses the *Brown* decision as exemplifying the moral reading of the Equal Protection Clause. Observing that the case involved serious moral issues, he argues, "The Equal Protection Clause forbids legal constraints or institutions that can be justified only on the ground that some citizens are inferior to others, or that their fates are of less than equal concern, and official racial segregation cannot be adequately justified on any other"; therefore, racial segregation cannot be justified under the Equal Protection Clause.[61] Dworkin's argument is not, however, a purely rational argument from moral principle. Rather, his claim that official racial segregation cannot be adequately justified on any basis other than inequality of the races presupposes that the separate-but-equal doctrine *logically* entails unequal treatment of the races, which may be an empirical inevitability but is not a logical one. And, indeed, the evidence, not logic, showed that, in practice, the separate-but-equal doctrine invariably entrained unequal treatment and unequal empirical consequences, both tangible and intangible, for members of the different races, including the plaintiffs.

Had the Court followed traditional jurisprudence in *Brown*, it could have overruled the separate-but-equal doctrine on the basis of the evidence of the effects of segregation upon the litigants and the plain language and evolving case law interpreting the Equal Protection Clause. The substantive "positive immunity,

58. *Brown*, 347 U.S. at 492.
59. *Id.*
60. *Id.* at 495.
61. Dworkin, *supra* note 6, at 1732.

or right . . . [of blacks] . . . [to] exemption from legal discriminations, implying inferiority in civil society"[62] was already there, embedded in the language and purpose of the Equal Protection Clause and recognized as such in case law as far back as *The Slaughter-House Cases* and repeatedly after that in the Court's public education cases. The evidence in *Brown* demonstrated that the education the plaintiffs were receiving was not equal to that of white children and was discriminatory in both tangibles and intangibles.[63] But the Court did not confine its ruling to the challenged laws and the facts of the case. Instead, it reasoned from moral principle via expert opinion regarding the intangible effects of segregation *in general* to the conclusion that segregation intrinsically violated the Equal Protection Clause, independently establishing a fundamental substantive constitutional right to racial equality that was violated by segregation, albeit, in this case, a right and a violation that would also have been found by traditional jurisprudential reasoning from precedent and fact.

The moral reading of the Constitution evinced in *Brown* had profound repercussions for constitutional law, not merely because it heralded the end of legal racial segregation in America, but because it set Fourteenth Amendment jurisprudence on a new course, one in which the Equal Protection Clause would come to be seen as protecting from legal discrimination not only individuals and classes subjected to racial discrimination expressly proscribed by the Constitution but also other "unpopular" classes identified by the courts as entitled to protection by the rational requirements of the abstract moral concept of equality itself as understood by judges. But *Brown*'s substantive expansion of the Equal Protection Clause was not the only linchpin in the turning of Fourteenth Amendment jurisprudence from a traditionalist to a perfectionist construction.

VI. Due Process and Personal Liberty

Just as the moral reading of the Constitution holds that the moral concept of *equality* in the Equal Protection Clause directly implies a fundamental substantive right of non-discrimination against judicially identifiable "suspect" or "target" classes, not merely against racial classes traditionally held to be protected by the Clause, so the moral reading also holds that the moral concept of *liberty* in the Due Process Clause directly implies the constitutional protection of judicially identifiable and enforceable

62. Strauder v. West Virginia, 100 U.S. 303, 307–08 (1879). *See supra* text accompanying note 54.

63. *See Brown*, 347 U.S. at 486 n.1.

fundamental substantive personal liberties not enumerated in the Constitution. And, indeed, it is this latter conception of moral substantive due process that has proved the most controversial and divisive in modern rights-based jurisprudence.

A. *Substantive Due Process and Personal Liberty*

The jurisprudential concept of substantive due process is not new. As is well known, it derives from the classic case of *Lochner v. New York*, decided in 1905.[64] In *Lochner*, the Supreme Court held, over vigorous dissents by Justice Holmes and the first Justice Harlan, that the right to contract was a fundamental personal liberty interest protected by the Due Process Clause and that this constitutionally protected interest must be balanced by the Court against—and in that case outweighed—the State of New York's right under its Tenth Amendment police power[65] to make laws relating to the public safety, health, morals, and general welfare. The *Lochner* Court held that in every case in which litigants seek constitutional protection for a right or liberty asserted to invalidate a state law the Court must ask, "Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . .?"[66] The Supreme Court thus took to itself in *Lochner* the right to determine independently whether substantive rights not enumerated in the Constitution were nevertheless fundamental personal liberties constitutionally protected against intrusion by the states, and it imposed a judicial balancing test to determine whether a personal liberty was infringed by state legislation, with the touchstone being the Court's own conception of fairness.

Although the *Lochner* Court insisted, "This is not a question of substituting the judgment of the court for that of the legislature,"[67] Justices Holmes and Harlan disagreed. The problem with the majority opinion, according to the dissents, was that the "constitutional" liberty of contract unpacked from the Due Process Clause in that case was neither a personal liberty expressly protected by the Constitution, such as freedom of religion or of the press, nor a personal liberty traditionally protected against state

64. Lochner v. New York, 198 U.S. 45 (1905).

65. *See supra* notes 38 and 41 for the text of the Tenth Amendment and the definition of "police power."

66. *Lochner*, 198 U.S. at 56.

67. *Id.* at 56–57.

intrusion, but a personal liberty traditionally regulated in the public interest.[68]

Justice Holmes opined that the *Lochner* case was "decided upon an economic theory which a large part of the country does not entertain," that "[g]eneral propositions do not decide concrete cases," and that

> the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[69]

Justice Harlan argued that even traditionally recognized fundamental personal liberties were "subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society" and that the judiciary might declare such regulations to be in excess of legislative authority only when "a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the [common] law," which it is the challenger's burden to prove.[70] He would have limited the power of the courts to review legislation "in respect of a matter affecting the general welfare" only if the legislation had "no real or substantial relation" to its stated objects.[71]

B. *Negative and Positive Personal Liberty*

Although *Lochner* was repudiated by the 1930s, the ideas found in Holmes's and Harlan's *Lochner* dissents did not die—namely, that the Constitution protects from state intrusion those non-enumerated personal liberties that have traditionally been recognized as personal and fundamental, and that Congress and the states may nevertheless regulate personal liberties when they collectively and rationally deem it best for the common good.[72]

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68. This dissenting view was later adopted by the Court. *See* Nebbia v. New York, 291 U.S. 502, 523 (1934) (holding that contracts, although generally protected from governmental interference, are subject to regulation in the common interest).

69. *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

70. *Id.* at 68 (Harlan, J., dissenting) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)).

71. *Lochner*, at 68 (Harlan, J., dissenting).

72. The concept had been recognized by the Supreme Court at least as far back as *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (recognizing inherent

In *Meyer v. Nebraska*, for example, the Supreme Court held the requirement that no state shall deprive any person of liberty without due process of law encompasses

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[73]

Fourteen years later, in *West Coast Hotel Co. v. Parrish*, the Court held that the "liberty" safeguarded by the Due Process Clause is liberty in social organization, which requires the protection of law against evils menacing the health, safety, morals, and welfare of the people; that this liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community; that questions of wisdom, justice, policy, or expediency of law are for legislatures alone; and that, although the courts may hold inconsistent views, a state law may not be annulled as unconstitutional unless it is palpably in excess of legislative power.[74] The part of *Lochner* repudiated in *West Coast* was the *Lochner* majority's holding that the Constitution protects from state regulation personal liberties which the judiciary independently identifies as fundamental to the concept of personal liberty but which the states traditionally have regulated in the interest of the public as a whole.

Then, in a famous 1958 essay, "Two Concepts of Liberty," Isaiah Berlin reintroduced into mid-century Anglo-American moral and political philosophy the two late eighteenth-century philosophical concepts of "negative" and "positive" personal liberty.[75] "Negative" liberty refers to the right of individuals to make

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rights to be free to use one's faculties in all lawful ways, to live and work where one wills, and "to pursue any livelihood or avocation" by all lawful means).

73. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

74. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–92 (1937).

75. *See* BERLIN, *supra* note 1, at 203 (defining and contrasting the two concepts of negative and positive liberty); Noel Annan, *Forward* to BERLIN, *supra* note 1, at ix, xix; *see also* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 17 (1997) ("Contemporary discussions of society and political organization are dominated by a distinction which Isaiah Berlin made famous. This is the distinction between what he, following a late-eighteenth-century tradition, describes as negative and positive liberty."). Dworkin acknowledges the centrality of Berlin's lecture to contemporary political philosophy. DWORKIN, FREEDOM'S LAW, *supra* note 5, at 21, 214; *see also* BLACK'S LAW DICTIONARY, *supra* note 26, at 825 (defining negative and positive liberty as constitutional terms).

personal moral decisions free from state interference. It requires that "a frontier must be drawn between the area of private life and that of public authority," creating a zone of personal moral freedom, or privacy, secured by the State against intrusion.[76] It thus comports in jurisprudence with Justices Holmes's and Harlan's and subsequent case law's recognition of a fundamental liberty interest in making private moral choices without governmental intrusion, such as where to live, whom to marry, or how to rear one's children.

The concept of "positive" personal liberty was, however, new and different. It is an inalienable liberty of personal self-determination in accordance with the rational requirements of the concept of personal liberty itself, and it is enforced equally for all by the State.[77] In Berlin's terms, positive liberty "consists in being one's own master," i.e., in liberating oneself from the spiritual slavery to one's lower self and identifying oneself with one's "'real', or 'ideal', or 'autonomous' self, or with [one's] self 'at its best.'"[78] This higher self is associated with reason and identified with the moral, or ideal, State, which exerts moral authority over the lower, empirical self.[79] Proponents of this philosophy view "the real self . . . as something wider than the individual . . . as a social 'whole' of which the individual is an element or aspect," and the social whole "is then identified as being the 'true' self which, by imposing its collective, or 'organic,' single will upon its recalcitrant 'members,' achieves its own, and therefore their, 'higher' freedom."[80] Public authority over personal liberty is implied to assure that the "true" positive liberty of self-determina-

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76. BERLIN, *supra* note 1, at 196.

77. *See* DWORKIN, FREEDOM'S LAW, *supra* note 5, at 21 (discussing Berlin's essay).

78. BERLIN, *supra* note 1, at 203–04.

79. *See id.*

80. *Id.* at 204. This view reflects the thinking of Rousseau in which the individual will is subsumed by the general will of society:

> If, then, we take from the social pact everything which is not essential to it, we shall find it to be reduced to the following terms: "each of us contributes to the group his person and the powers which he wields as a person under the supreme direction of the general will, and we receive into the body politic each individual as forming an indivisible part of the whole." As soon as the act of association becomes a reality, it substitutes for the person of each of the contracting parties a moral and collective body made up of as many members as the constituting assembly has votes, which body receives from this very act of constitution its unity, its dispersed *self*, and its will.

JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762), *reprinted in* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME & ROUSSEAU 167, 181 (Ernest Barker ed., Gerard Hopkins trans., Oxford Univ. Press 1962). On this view, individual moral will is

tion, i.e., the liberty of the individual to act in accordance with the requirements of reason, is secured for all equally. As Berlin explained it, because "[y]ou lack political liberty or freedom only if you are prevented from attaining a goal by human beings," the goal of the State that seeks to enforce positive liberty is to ensure the "[e]quality of liberty" by requiring that you give up for your fellow man that freedom in which he does not share equally.[81] Thus, the concepts of liberty and equality merge at the level of "true" abstract morality.

C. *Two Conceptions of Positive Personal Liberty*

Recognizing the nature of tyrannies, Berlin himself was appalled by the concept of the State, as a thing apart from actual people with license to identify and secure the "higher" or "true" positive personal liberty for individual citizens in moral matters against the will of the majority (insofar as the majority's "will" is expressed by the State's law).[82] But Dworkin embraces the concept of positive individual liberty, or the liberty of self-determina-

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absorbed into the general will—that is, the State may act on behalf of the people, not as they direct, but as the rational requirements of liberty direct.

81. *See* BERLIN, *supra* note 1, at 194–97. This idea has gained great traction in contemporary American moral and political philosophy. *See, e.g.*, RAWLS, *supra* note 35, at 60 (positing the "liberty" principle and the "difference" principle, a variant of the principle of equality, as the determinative principles of a just society, where the liberty principle is the principle that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others"); *see also* PETTIT, *supra* note 75, at 8 (decrying democratic republicanism "that represents the people in their collective presence as master and the state as servant" and extolling the "commonwealth or republican position [that] sees the people as trustor, both individually and collectively, and sees the state as trustee: in particular, it sees the people as trusting the state to ensure a dispensation of non-arbitrary rule").

82. Berlin states:

> If the universe is governed by reason, then there will be no need for coercion; a correctly planned life for all will coincide with full freedom—the freedom of rational self-direction—for all. This will be so if, and only if, the plan is the true plan—the one unique pattern which alone fulfils the claims of reason. Its laws will be the rules which reason prescribes: they will only seem irksome to those whose reason is dormant, who do not understand the true "needs" of their own "real" selves. So long as each player recognizes [sic] and plays the part set him by reason—the faculty that understands his true nature and discerns his true ends—there can be no conflict. Each man will be a liberated, self-directed actor in the cosmic drama . . . .
>
> The common assumption of these thinkers (and of many a schoolman before them and Jacobin and Communist after them) is that the rational ends of our "true" natures must coincide, or be made to coincide, however violently our poor, ignorant, desire-ridden, passionate, empirical selves may cry out against this process. Freedom is

tion, as a fundamental moral right implicit in the concept of liberty embodied in the Fourteenth Amendment, and one whose substantive implications the courts, as agents of the moral State, are best suited to identify and enforce equally for all in accordance with its rational implications. Dworkin contrasts this view of positive liberty with the traditional view that the personal positive liberty of self-determination consists in the moral and political right of the people to participate freely and equally in governing themselves by majority vote, which Dworkin describes as the "tyranny of the majority."[83] How, Dworkin asks, can the individual be free when he is forced to bend to the will of the majority?[84]

In the idealist philosophy Berlin describes, and to which Dworkin subscribes, "true" personal liberty is not individual liberty in private matters, together with the liberty of each member of society to participate freely and equally through his elected representatives in defining the boundaries of personal freedom for all. Rather, the liberty of moral self-determination remains with each individual, and it is the duty of the courts—acting independently of the common will in the exercise of their own best judgment—to determine what the free and equal exercise of personal self-determination rationally requires and to protect *that* fundamental liberty interest, thereby constraining the people's right to actualize their own collective conception of the common good in moral matters that affect them all in order to implement the true rational conception of *individual* liberty.

In support of this view, Dworkin argues that when morality is at issue, society's members should not be regarded as members of an *actual* empirical political community in which each has an equal vote—i.e., as persons equally entitled to contribute to the public expression of the morality of the community through their representatives—but instead as members of a "true" or "genuine political community" that is "a community of independent moral agents," each of whom has a right of self-determination in moral matters that is not amenable to co-option by the laws made by the majority and is entitled to protection under a superior law of personal moral freedom.[85]

Dworkin reasons, "If true democracy is government by the people, in the communal sense that provides self-government,

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not freedom to do what is irrational, or stupid, or wrong. To force empirical selves into the right pattern is not tyranny, but liberation.

BERLIN, *supra* note 1, at 218–19.

83. *See* DWORKIN, FREEDOM'S LAW, *supra* note 5, at 21.

84. *Id.* at 22.

85. *See id.* at 27.

the true democracy is based on moral membership."[86] An actual democracy is not a "true," or truly moral, democracy because membership, i.e., the liberty of self-determination in matters of morality, is accorded only to those who share the morality of the majority and that collective liberty is "compromised when the majority is prevented from securing its will."[87] The collective liberty of the actual majority to govern must, therefore, be constrained in order to protect the personal moral liberty of each member of the moral community against the tyranny of the moral majority.[88] Accordingly, in matters of moral principle, Dworkin urges rejection of the majoritarian premise that lies at the heart of American democratic political theory, stating:

> In some circumstances . . . individual citizens may be able to exercise the moral responsibilities of citizenship better when final decisions are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.[89]

Because the legislature of an actual political democracy organized in terms of majority rule, like our own, will, by definition, not take a hands-off approach to the assertion of a right to state protection of non-traditional and non-enumerated individual rights that, in the judgment of the majority, negatively impact the health, safety, welfare, or morals of the whole, the political power of the moral minority is best expressed by political pressure on the courts.[90]

Dworkin concedes that legislatures, as well as judges, may be "guardians of principle too, and that includes constitutional prin-

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86. *Id.* at 23.

87. *Id.*

88. The conception of the fundamental right of the individual to self-assertion or self-determination as a constraint on the legitimate exercise of legislative power by the whole owes a great deal to Rousseau. *See supra* note 80. It is further developed in Mill's essay, *On Liberty*. *See* JOHN STUART MILL, ON LIBERTY, *in* UTILITARIANISM 126 (Mary Warnock ed., World Publ'g Co. 1962) (1859). In that essay, Mill introduced the concept of "the tyranny of the majority" as "among the evils against which society [is] require[d] to be on its guard." *Id.* at 129. He suggested, "There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism." *Id.* at 130.

89. DWORKIN, FREEDOM'S LAW, *supra* note 5, at 30–31.

90. *See id.* at 27 ("We do not want wealth to affect political decisions, but that is because wealth is unequally and unfairly distributed. We certainly do want influence to be unequal in politics for other reasons: we want those with better views, or who can argue more cogently, to have more influence.").

ciple."[91] But, he argues, "[w]e must set the majoritarian premise aside, and with it the majoritarian conception of democracy" because "[i]t is not a defensible conception of what true democracy is, and it is not America's conception."[92] "True" democracy is democracy under conditions of rational personal moral liberty and equality as determined by philosophers; and it is "true" democracy, not the will of the majority of the actual members of society as determined on a one-person/one-vote basis, that the courts should enforce. This is, of course, an ideal whose realization is beyond human compass. However, "the democratic conditions set out in the Constitution are sufficiently met in practice so that there is no unfairness in allowing national and local legislatures the powers they have under standing arrangements."[93] Although Dworkin acknowledges that "democracy would be extinguished by any general constitutional change that gave an oligarchy of unelected experts power to overrule and replace any legislative decision they thought unwise or unjust," he argues that the situation is different when "the question is plausibly raised whether some rule or regulation or policy itself undercuts or weakens the democratic character of the community, and the constitutional arrangement assigns *that* question to a court."[94] Dworkin's challenge to the traditional conception of judicial integrity as respect for the laws made by the people in accordance with their own conception of the empirical boundaries best placed on individual moral liberty for the good of the whole, so long as those laws do not infringe a higher law in the hierarchy of positive laws, is stark.

On the traditional view, the members of society are free and equal in truly private matters, and they have the inalienable moral and political right—or positive liberty—to participate equally in deciding moral issues that affect the whole for themselves through their elected representatives and to have their votes aggregated impartially on the basis of the one-person/one-vote principle and majority rule within constitutional constraints. In such an actual democracy, the people do *not* surrender their moral autonomy to an independent, unelected judiciary, acting as "trustee" of their moral interests and empowered to determine the good of the whole on their behalf in accordance with reason. Rather, a free and equal people insist upon the right to elect their own representatives and, through them, to determine for

91. *Id.* at 31.
92. *Id.*
93. *Id.* at 32.
94. *Id.*

themselves collectively which personal liberties are beyond their power to regulate, both by placing constitutional constraints on their own collective power in the form of constitutionally enumerated personal rights that may not be infringed and by constitutionally setting aside for themselves the power to define the boundary between the legitimate exercise of state regulation for the common good and governmental intrusion upon their fundamental personal liberties. Thus, in contrast to judges who read the Constitution morally, the negative and positive liberties enforceable by the courts on a traditional view are decided *by the people's own agreement*, and only *these* agreed-upon rights are properly secured by the courts against contrary expressions of the majority will.

From the traditionalist point of view, Dworkin errs in failing to recognize or acknowledge that the individual exercise of moral self-determination may affect other persons and institutional arrangements with consequences far beyond those for the persons asserting the liberty of self-determination. In other words, Dworkin fails to situate the exercise of personal moral liberty within the empirical moral nexus that governs practical moral and legal judgments and fails to recognize that personal moral decisions may affect the common good. By affirming the right of individuals to determine their own personal morality on issues that affect other people and institutions without considering the impact on the whole, judges who adopt Dworkin's theory of the courts as the arbiters of constitutionally protected positive personal liberties necessarily deny the liberty of the people to set the limits of their own personal moral freedom collectively on matters that affect them all. In its place, they license individual moral liberty bound only by a judicial determination that the liberty licensed is implicit in the concept of liberty itself—which is no boundary at all, since the abstract concept of personal liberty necessarily implies *all* substantive personal moral liberties.

"True" democracy, as Dworkin describes it, which the courts enforce as arbiters of the conditions of liberty, rather than leaving it to the people to determine the limits of their own collective freedom on a free and equal basis, is the antithesis of actual democracy in that it does not incorporate respect for the original moral and political right on which the American government was founded—the right of the people themselves to make through their elected representatives those laws for their own governance that they believe most conducive to the good of all. Rather, "democracy" is the philosophic projection of how people *would* vote if "true" democratic conditions were realized, i.e., if they were all ideally equal, free, and rational participants in structur-

ing an ideal state in accordance with "true" moral propositions. And the moral and political duty of judges is to identify and enforce the "true" conditions of moral freedom denied by the collective will of the actual majority. On this view, the integrity of the law is not preserved by the interpretation of the positive law by judges bound by the strict rules and precedents in the positive law; rather, the truly moral law is what judges bound only by their own "best" judgment say it is.

Dworkin acknowledges that his theory lacks a "positive argument in *favor* of judicial review, either in the form that institution has taken in the United States or in any other form," as the best means of maintaining democracy once the intellectual underpinnings of majoritarianism have, as he believes, been demolished.[95] He, therefore, ends his argument by asking, "What shall we say about the remaining questions, the institutional questions the moral reading does not reach?"[96] That is, how do "we" restructure society to attain the true democratic conditions necessary to the moral state? His solution:

> I see no alternative but to use a result-driven rather than a procedure-driven standard for deciding them. The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions.[97]

In other words, where the end is the creation of a truly moral society—a just society—the end justifies whatever means it takes to secure stable compliance with the dictates of moral reason. Since the United States is an *actual* political democracy, and not an ideal one, however, its positive law reflects only the tyranny of the majority, which must be jettisoned to protect the values of the true democracy of a moral community that realizes the higher self of the people and whose conditions it is the duty of judges of integrity to discern and enforce. True democracy, like true liberty and equality, is, on this view, too precious to be entrusted to the people.

Nevertheless, because we have no institutions that can infallibly assure the morality of the positive law, Dworkin argues that, given the institutional structure of government we actually have, there is no reason to resist the "straightforward interpretation of American constitutional practice [which] shows that our judges have final interpretive authority, and that they largely under-

95. *Id.* at 33.
96. *Id.* at 34.
97. *Id.*

stand the Bill of Rights as a constitution of principle"[98] and, therefore, have the authority (and, as judges of integrity, the duty) to correct for moral injustice in the positive law. Dworkin thus advocates a result-driven judiciary with license to interpret the law by identifying in the moral concepts of liberty and equality in the Fourteenth Amendment and enforcing whatever substantive personal rights or liberties a majority of judges on a panel or court believe in *their* best independent judgment are necessary to establish the true democratic conditions of a just society (with no account being taken of differing moral views among the judiciary itself). By redefining democracy—and defining out of the collective moral whole anyone who disagrees with the majority's moral pronouncements and placing their protection in the hands of courts bound only by the independent moral judgment of *their* majorities—Dworkin necessarily comes to a conception of social and judicial moral integrity that directly opposes the traditional American conception.

For the reasons set forth above, I believe Dworkin's argument rests on false assumptions, namely that neither the democratic structure of American government nor its positive law is "truly" moral; that actual democracy does not protect true equality or true personal liberty; and that traditional jurisprudence does not preserve the systemic morality of the positive law because there is no systemic morality in the positive law to preserve. Nevertheless, the conception of the courts—particularly the Supreme Court—as the final authority in saying what the principles of equality and personal liberty, both negative and positive, morally require has been a dominant force in Fourteenth Amendment jurisprudence for the last half-century.

VII. THE PERFECTIONIST CONSTRUCTION OF CONSTITUTIONAL LIBERTY

A. Poe v. Ullman

The modern conception of a zone of privacy, or negative freedom from governmental intrusion into personal moral decision making, entered the modern Supreme Court's due process jurisprudence with the second Justice Harlan's famous dissent in *Poe v. Ullman*,[99] decided three years after the publication of Berlin's essay on liberty. *Poe* denied review of a Connecticut law prohibiting the use of contraceptive devices and the giving of

98. *Id.* at 35.

99. Poe v. Ullman, 367 U.S. 497 (1961).

medical advice as to their use,[100] which the Supreme Court would invalidate four years later in *Griswold v. Connecticut.*[101] Addressing the plaintiffs' asserted right to marital privacy, Justice Harlan opined that the power of the State to act is limited by a concept of "privacy that is implicit in a free society" and that "emanates from the totality of the constitutional scheme under which we live."[102] If the State invades that zone of privacy, it acts unconstitutionally. Included within this sphere is "the privacy of the home" including "marital intimacy."[103]

Justice Harlan also recognized, however, that the zone of personal liberty had traditionally been circumscribed by the will of the majority in a social context and that these societal limitations, when long held and essential to the concept of ordered liberty, were themselves of fundamental status. Thus, he opined, society has a right to enact "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up" and a corresponding right to enact laws forbidding sexual practices that contradict the proposition of confining sexuality to marriage.[104] Harlan further pointed out that "always and in every age" society has exercised its right to decide who may marry and when the sexual powers may and may not be used to foster and protect marriage.[105] In other words, Justice Harlan's *Poe* dissent recognized both a negative liberty interest, or zone of privacy, in which personal moral decision making is protected from governmental intrusion, and the constitutional right of the people to enact laws that constrain personal moral self-determination when they rationally deem it best in order to further the common good. He thus recapitulated the insights into the concept of personal liberty evinced by the first Justice Harlan and by Justice

100. *Id.* at 509.

101. Griswold v. Connecticut, 381 U.S. 479 (1965).

102. *Poe,* 367 U.S. at 521. *Cf.* BERLIN, *supra* note 1, at 198 (describing negative liberty as "reserving a large area for private life over which neither the State nor any other authority must be allowed to trespass").

103. *Poe,* 367 U.S. at 548 (Harlan, J., dissenting).

104. *Id.* at 546.

105. *Id.* at 552–53. Justice Harlan stated:

> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.

Id. at 553.

Holmes in their *Lochner* dissents and carried forward in *Meyer* and *Parrish.*[106]

Justice Harlan did not, however, endorse the notion that the Constitution *also* guarantees a fundamental right of positive personal liberty, or self-determination, whose substantive attributes are subject to independent identification and enforcement by the courts as constraints on the exercise of the police power of the states; nor had this concept of liberty been historically approved in American jurisprudence, other than in the *Lochner* majority opinion and its progeny, when *Poe* was decided. Nevertheless, when the concept of the courts as the protectors of unenumerated individual personal liberties under the Due Process Clause entered modern Supreme Court jurisprudence in *Griswold,*[107] four years after *Poe,* it was not confined to the recognition of the courts as protectors of privacy or of positive liberties long deemed essential to ordered liberty, such as the right to marry with rational limits imposed by the State. It was accompanied by the revival of the concept of the courts as protectors of positive liberties they independently deem implied by the concept of liberty itself, even if opposed by the majority of the people, i.e., it was accompanied by the revival of substantive due process.

B. Griswold v. Connecticut

The Supreme Court held in *Griswold* that "specific guarantees in the Bill of Rights have penumbra, formed by emanations from those guarantees that help give them life and substance."[108] Thus, the Constitution protects not only enumerated substantive rights but also a "zone of privacy created by several fundamental constitutional guarantees,"[109] within which the Court identified a "basic and fundamental" right of privacy in marriage.[110] Recognizing that this right of marital privacy could be construed as a substantive due process right derived directly from the abstract concept of personal liberty, the Court distinguished *Lochner,* stating (in language eerily similar to that of the majority in *Lochner*), "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their

106. *See supra* text accompanying notes 67–74.
107. Griswold v. Connecticut, 381 U.S. 479 (1965).
108. *Id.* at 484.
109. *Id.* at 485.
110. *Id.* at 490 (Goldberg, J., concurring).

physician's role in one aspect of that relation."[111] The Court's statement can be read, of course, not as disavowing *Lochner*, but as justifying substantive due process when the question is a moral one as opposed to an economic one.[112]

That two different concepts of personal liberty were at issue in *Griswold*—the concept of negative liberty, or privacy, and that of positive liberty, or a fundamental right to state protection of individual self-determination in moral matters—was recognized immediately, if inchoately, by the concurring justices, Goldberg and Harlan. Justice Goldberg would have held that "the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'"[113] including rights "which exist alongside those fundamental rights specifically mentioned in the [Bill of Rights]."[114] He would thus have found that the right of privacy, that is, "'the right to be let alone,'" including, in particular, "the right 'to marry, establish a home and bring up children' was an essential part of the liberty guaranteed by the Fourteenth Amendment."[115] However, he did not believe that judges were empowered to decide cases "in light of their personal and private notions" when determining which rights were fundamental; rather, they must look to the deeply rooted "'traditions and (collective) conscience of our people'" to determine whether a right is such "that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all

111. *Id.* at 482 (majority opinion). For the language from *Lochner*, see *supra* text accompanying note 66.

112. While a "right of marital privacy" can be understood as a traditionally protected personal liberty, the Court would later describe this same right more expansively as "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"—that is, as a fundamental "reproductive right." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). In *Lawrence v. Texas*, this same fundamental right would be expanded in another direction as "the right to make certain decisions regarding sexual conduct [that] extends beyond the marital relationship." 539 U.S. 558, 565 (2003). *Eisenstadt* and *Lawrence* are discussed *infra* Sections VII.C and VII.F, respectively. Dworkin refers to the correlative moral principle for this right as "the principle of procreative autonomy." DWORKIN, FREEDOM'S LAW, *supra* note 5, at 102.

113. *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

114. *Id.* at 488.

115. *Id.* at 494–95 (citations omitted). Justice Black, on the other hand, would not have recognized a constitutionally protected zone of privacy. *See id.* at 510 (Black, J., dissenting) ("I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.").

civil and political institutions'"[116] and thus can be invaded by the State only to protect a compelling state interest.[117] Justice Harlan, likewise, thought the proper constitutional inquiry was whether the statute at issue violated "basic values 'implicit in the concept of ordered liberty,'"[118] which he believed the Fourteenth Amendment protected generally, but he did not interpret the rights protected by the Amendment as restricted to those identified by judges as "assured by the letter or penumbra of the Bill of Rights."[119]

In sum, the concurring justices would have interpreted the Due Process Clause as requiring that the State respect both personal privacy, or negative liberty, and the fundamental positive liberties traditionally defined and protected by the positive law. They did not, however, interpret the Constitution as permitting the courts independently to identify and enforce as constitutionally protected rights substantive personal liberties deemed to "emanate" from constitutionally enumerated rights or to be rationally implied by the concept of liberty itself, such as a right of marital privacy.

C. Eisenstadt v. Baird

In *Eisenstadt v. Baird*, decided in 1972, the Supreme Court extended the fundamental substantive liberty it had identified in *Griswold* by invalidating a law that prohibited the distribution of contraceptives to unmarried persons.[120] Although the case was decided under the Equal Protection Clause, the Court went on to state that the fundamental right of privacy identified in *Griswold* was "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[121] The Court thus added an additional, non-traditional substantive gloss to the concept of constitutionally protected sexual and reproductive rights—the right of both married and single people to "bear and beget" children without "unwarranted governmental intrusion" as independently determined by the courts.

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116. *Id.* at 492–95 (Goldberg, J., concurring) (citations omitted).

117. *Id.* at 497–98.

118. *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

119. *Id.* at 499.

120. Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

121. *Id.* at 453.

D. Roe v. Wade

In the abortion rights cases, beginning with *Roe v. Wade*[122] in 1973, the Supreme Court made its most dramatic statement of fundamental sexual and reproductive rights. *Roe* has been both applauded and blamed for judicially resolving the debate of the American people regarding a woman's right to an abortion, and it has been the subject of repeated attempts by legislatures, including the United States Congress, to probe its scope and circumvent its strictures ever since. *Roe* is much more complex than the cases that are the focus of this paper because it involves direct questions not only of individual moral self-determination and the limits of legislative power to regulate "a woman's right to her own body," but also questions of the existence or non-existence, relevance, and inter-relationship of the legal and moral rights of mother, father, fetus, and state. Thus, a thorough examination of *Roe* and its progeny would swamp this paper, and I cite it solely for its place in the evolution of the moral reading of the Constitution.

The Supreme Court began the opinion by acknowledging "the sensitive and emotional nature of the abortion controversy" and of the "vigorous opposing views" abortion generated depending on "[o]ne's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe."[123] The plaintiff asked the Supreme Court to "discover" a right of a pregnant woman to choose to terminate her pregnancy "in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras; or among those rights reserved to the people by the Ninth Amendment."[124] The Court surveyed the history of criminal abortion laws and determined them to be of recent statutory vintage, "effected, for the most part, in the latter half of the 19th century."[125] It then argued that the historical social and medical reasons advanced to justify such statutes had disappeared, but it determined that, in assessing the third interest advanced to justify abortion statutes,—"the State's interest . . . in protecting prenatal life"—"recognition may be given to the . . . claim that as long as at least potential life is involved, the State

122. Roe v. Wade, 410 U.S. 113 (1973).
123. *Id.* at 116.
124. *Id.* at 129 (citations omitted).
125. *Id.*

may assert interests beyond the protection of the pregnant woman alone."[126]

The Court's legal argument was succinct. It observed that, "[t]he Constitution does not explicitly mention any right of privacy," but that a line of Supreme Court decisions had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[127] It concluded,

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[128]

It determined, however, that the right was not absolute; rather, "[t]he Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate."[129] Therefore, "this right is not unqualified and must be considered against important state interests in regulation."[130]

The Court then considered lower court decisions and determined that some had invalidated state abortion statutes as vague or overbroad, while others had sustained them, but "[a]lthough the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision."[131] Agreeing with this approach, it held that where such "'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest.'"[132] The Court rejected the argument that the term "person" had a "pre-natal application" entitling the unborn to Fourteenth Amendment protection.[133] However, it found it "reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved" so "[t]he woman's privacy is no longer sole and any right of privacy she

126. *Id.* at 150.
127. *Id.* at 152 (citing cases).
128. *Id.* at 153.
129. *Id.* at 153–54.
130. *Id.* at 154.
131. *Id.* at 155.
132. *Id.*
133. *Id.* at 157–58.

possesses must be measured accordingly."[134] The Court rejected the argument that the State's interest in protecting pre-natal life began at conception. Rather, it stated, "the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester," because of "the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[135] Thus, "from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[136] Prior to this "'compelling' point," the State may not interfere with a woman's right to choose an abortion or a physician's right to terminate a pregnancy.[137] The "compelling" point for "the State's important and legitimate interest in potential life," however, is viability, after which point the State "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."[138]

Regardless of one's approbation or disapprobation of the *Roe* decision, this was a ground-breaking decision in terms of the Supreme Court's assertion of a well-defined fundamental personal right that lacked ancient historical roots among rights secured to the American people; that directly and indirectly intersected the interpersonal moral and legal rights of others, including spouses and, it was unsuccessfully argued, the unborn fetus; and that specified in detail to what extent states had the police power to regulate the public health, safety, welfare, and morals of those seeking abortions.

Not only did *Roe* establish a fundamental substantive due process right to an abortion, it both recognized the comprehensive effect of its ruling and specifically defined the scope of state power to regulate abortions, relying upon the decisions of lower courts and its own independent determination of when legally protected human life begins. There is thus no question that *Roe* is a landmark case evincing the moral reading of the Constitution. Nor is there any question that it has generated legislative resistance that continues to the present day.

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134. *Id.* at 159.
135. *Id.* at 163.
136. *Id.*
137. *Id.*
138. *Id.* at 163–64.

E. Romer v. Evans

The constitutional protection judicially afforded to sexual freedom was further expanded by the Supreme Court in 1996 in *Romer v. Evans.*[139] *Romer*, like *Eisenstadt*, involved an Equal Protection, rather than a Due Process, challenge to a state constitutional amendment adopted by the Colorado voters in a statewide referendum, partly in response to ordinances passed in some Colorado municipalities banning discrimination against homosexuals in various transactions and activities. The amendment repealed those local laws to the extent they accorded protected status based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships," and it prohibited governmental action that entitled "any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."[140]

The State of Colorado argued that homosexuals were not a constitutionally protected class and that Amendment 2 was grounded in respect for other citizens' constitutional right to freedom of association "and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[141] While acknowledging that homosexuals were not a protected class and that "the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations,"[142] the Supreme Court observed that some states, including Colorado, had countered discrimination "by enacting detailed statutory schemes" that "depart from the common law by enumerating the groups or persons within their ambit of protection," thus making concrete the general "duty not to discriminate."[143] It further observed, "Colorado's state and local governments [had] not limited antidiscrimination laws to groups that have *so far* been given the protection of heightened equal protection scrutiny under our cases."[144] Thus the Court

139. Romer v. Evans, 517 U.S. 620 (1996).

140. *Id.* at 624 (quoting COLO. CONST. art. II, § 30(b)). Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, dissented. The majority read the amendment as banning "claim[s] of discrimination" by homosexuals and laws "designed to protect" homosexuals. *Id.* Justice Scalia read it as preventing only "*preferential* treatment" of homosexuals. *Id.* at 638–39 (Scalia, J., dissenting).

141. *Id.* at 635 (majority opinion).

142. *Id.* at 627–28 (citing The Civil Rights Cases, 109 U.S. 3, 25 (1883)). The Fourteenth Amendment does, however, give *Congress*—and not the courts—the power to enforce equal protection by appropriate legislation. U.S. CONST. amend XIV, § 5.

143. *Romer*, 517 U.S. at 628.

144. *Id.* at 628–29 (emphasis added).

implied that, even though the Constitution did not recognize a broad, general "duty not to discriminate" against, or "target," morally "unpopular" classes, the enumeration of group rights in state ordinances and statutes was a process that by itself could generate such constitutional group rights.

The Court did not, however, declare homosexuals a protected class or declare homosexual conduct a fundamental constitutional right implicit in the moral concept of equality or liberty. Instead, it held that Amendment 2 failed to satisfy the rational basis test because it imposed "a broad and undifferentiated disability on a single named group," which the Court held to be an "invalid form of legislation," even as it recognized the "practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[145]

The rational basis test, as the Court recognized, merely requires that a state law bear a rational relationship to a legitimate state purpose.[146] Thus, that test, traditionally applied, would have required the Court to determine whether Colorado had a rational basis for enforcing the constitutional right of association by generally forbidding claims of "minority status . . . , protected status or claim of discrimination"[147] by homosexuals, and the amendment might have been held invalid under that test. But while the Court invoked the rational basis test, it went far beyond that test and made a moral judgment that Amendment 2 was not "directed to *any* identifiable legitimate purpose or discrete objective"[148] because its real purpose was to "classif[y] homosexuals not to further a proper legislative end but to make them unequal to everyone else."[149] The Court then opined that "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[150]

The *Romer* decision represents a significant departure from traditional jurisprudence in several respects. First, declaring it an illegitimate state purpose to "target" a morally "unpopular" group for legal discrimination "with resulting disadvantage" to

145. *Id.* at 631–32.

146. *Id.* at 632 ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.").

147. *Id.* at 624 (quoting COLO. CONST. art. II, § 30(b)).

148. *Id.* at 635 (emphasis added).

149. *Id.*

150. *Id.* at 632.

the group defies the reality of law, as the Court itself acknowledged[151]—and not only the reality of law but the nature of practical, empirical judgment itself. It can hardly be illegitimate for states to identify and target for discrimination the moral class of sadists, sado-masochists, pornographers, child predators, rapists, killers, check forgers, or even trespassers in their capacity as such. The *Romer* Court, however, read the concept of liberty in the Constitution as rationally implying the illegitimacy of discrimination against homosexuals based on its own determination that the Constitution forbids "animus" against moral minorities, i.e., it read the Constitution morally.

Second, the *Romer* Court reasoned that fundamental *constitutional* duties and rights are changed by changing trends in the laws enacted by state legislatures and subordinate local bodies,[152] rather than reasoning that local ordinances and state laws are to be tested against a fair reading of the language of the Constitution and controlling precedent. From a traditional legal perspective, this is backwards reasoning. On this understanding of an "evolving Constitution," the Constitution has no meaning of its own but such as the courts derive from current local rules and subordinate laws they favor or from any other sources that support the best constructive view of the rational requirements of personal liberty. *Romer*'s recognition of an emerging fundamental constitutional right of morally "unpopular" classes not to be discriminated against (which overrides the constitutionally-enumerated right of freedom of association) thus defies the constitutional procedures for both the legislative creation of substantive rights and the creation of new constitutional rights through procedures set out in Article V of the Constitution.[153] *Romer*'s asser-

151. *See id.* at 631–32 (recognizing the "practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons"); *cf. id.* at 647 (Scalia, J., dissenting) (noting that the Court's reading of equal protection "is proved false every time a state law prohibiting or disfavoring certain conduct is passed").

152. *See id.* at 628 (majority opinion) ("Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond . . . the common law."). Not only are these laws broad, but they "also depart from the common law by enumerating the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply." *Id.*

153. Article V provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case,

tion of the authority of judges to derive a fundamental, substantive constitutional right of moral non-discrimination (or the constitutional illegitimacy of moral discrimination) directly from their own independent assessment of the moral requirements of equality and to decide legal cases and invalidate general laws on the basis of those rights follows directly from the moral reading of the Constitution.

Finally, there is no support either in the language of the Constitution or in precedent for the Supreme Court's conclusions in *Romer* that the enforcement of the morality of the people is *per se* an illegitimate state purpose. Rather, the protection of community morality is not only a traditional function of government but also one constitutionally recognized as belonging to the states under the police power conferred on them by the Tenth Amendment and on Congress by the Fourteenth Amendment, limited only by the enumerated rights in the Constitution and the constitutionally protected zone of privacy.

Thus, while the law at issue in *Romer* could have been invalidated by a traditional court on the basis of the lack of a rational relation between the sweeping law and its professed objectives, it could not have been invalidated by such a court on the grounds stated in the *Romer* opinion. The *Romer* Court's argument and conclusion are, however, compatible with Dworkin's arguments that a "true" democracy is a moral community in which each member—and, by extension, each moral class—has an inalienable right to self-determination that is infringed whenever that person's or class's moral self-expression is "targeted" by the majority for discrimination and that judicial integrity requires that the moral majority be prohibited from infringing individual moral liberty.

F. Lawrence v. Texas

In *Lawrence v. Texas*, decided in 2003, seven years after *Romer*, the Supreme Court extended the departures from tradi-

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> shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V. No power of the judiciary to recognize and implement emerging constitutional rights was recognized in 1972, when feminists sought passage of the proposed Equal Rights Amendment to the Constitution, which has yet to be approved by the necessary thirty-eight states. *See* Roberta W. Francis, The History Behind the Equal Rights Amendment, http://www.equalrightsamendment.org/era.htm (last visited Oct. 24, 2007).

tional constitutional reasoning evinced in *Romer*.[154] In *Lawrence*, the Court turned from the Equal Protection Clause to find in the "broad statements of the substantive reach of liberty under the Due Process Clause"[155] a fundamental substantive right of consenting adults to "engage[ ] in sexual practices common to a homosexual lifestyle . . . without intervention of the government."[156] Relying on the line of cases following from *Griswold*[157]—cases which the Court credited with establishing that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship"[158]—the Court held that "the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person," a dimension broad enough to encompass the substantive right to choose homosexual conduct.[159] Thus, the Texas law at issue, which penalized homosexual sodomy, like the state constitutional amendment at issue in *Romer*, furthered "no legitimate state interest"[160] and was unconstitutional.

The Court concentrated the bulk of its argument in *Lawrence* on overruling *Bowers v. Hardwick*, which had upheld a similar Georgia statute seventeen years earlier.[161] Again, as in *Romer*, the

154. Lawrence v. Texas, 539 U.S. 558 (2003).

155. *Id.* at 564.

156. *Id.* at 578. Only Justice O'Connor, concurring in the judgment, based her opinion on the Equal Protection Clause, stating, "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" *Id.* at 583 (O'Connor, J., concurring) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)). As in *Romer*, Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, dissented.

157. Griswold v. Connecticut, 381 U.S. 479 (1965).

158. *Lawrence*, 539 U.S. at 565. For a comparison of a case where the court struck down an anti-contraceptive law based on how it affected *conjugal* sexual-privacy rights, see *supra* Section VII.B regarding *Griswold*.

159. *See Lawrence*, 539 U.S. at 565–67.

160. *Id.* at 578.

161. Bowers v. Hardwick, 478 U.S. 186 (1986). In *Bowers*, decided in 1986, the Supreme Court had held that the Due Process Clause did not confer a fundamental right of sexual freedom on homosexuals to engage in sodomy and that, therefore, Georgia's sodomy statute was not unconstitutional. The Court opined that it had "sought to identify the nature of the rights qualifying for heightened judicial protection," including "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed,'" *Bowers*, 478 U.S. at 191–92 (alteration in original) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)), and those liberties that are "'deeply rooted in this Nation's history and tradition.'" *Id.* at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion)). However, "neither of these formulations would

Court supported its decision by recourse to "emerging" moral standards as reflected in an increasing number of states' invalidation of their sodomy laws.[162] But it found the principal support for its decision in foreign law, repudiating what the Court called "sweeping references" by Chief Justice Burger in *Bowers* "to the history of Western civilization and to Judeo-Christian moral and ethical standards."[163] The Court stated that *Bowers* "did not take account of other authorities pointing in an opposite direction"—namely the British Parliament's repeal of sodomy laws and the European Court of Human Rights' decision in a case similar to *Bowers*.[164] The *Lawrence* Court added, "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."[165]

Although the *Lawrence* Court stated that the doctrine of stare decisis, or reliance on precedent to maintain uniformity, "is essential to the respect accorded to the judgments of the Court

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extend a fundamental right to homosexuals to engage in acts of consensual sodomy" since "[p]roscriptions against that conduct have ancient roots." *Id.* After reciting a historical list of anti-sodomy statutes, the Court opined that it was not "inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause" because "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.* at 194.

Justice Blackmun, however, dissented in *Bowers* from the Court's refusal to recognize "the fundamental interest all individuals have in controlling the nature of their intimate associations with others." *Id.* at 206 (Blackmun, J., dissenting). He would have held that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was nothing more than "religious intolerance" that provided no rational basis for the state sodomy law at issue. *Id.* at 196, 211–12. He opined, "No matter how uncomfortable a certain group may make the majority of this Court, we have held that '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'" *Id.* at 212 (quoting O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)). Justice Stevens, too, expressed the view that the liberty interest of the individual in making "certain unusually important decisions that will affect his own, or his family's, destiny" implicates "fundamental" basic values that trump the right of the people as a whole to make laws they deem best to further the common interests of the whole. *Id.* at 217 (Stevens, J., dissenting) (quoting his own majority opinion in Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719–20 (7th Cir. 1975)). Thus both dissenters argued in favor of reading the Due Process Clause morally.

162. *See Lawrence*, 539 U.S. at 572. At the time of *Bowers*, twenty-four states and the District of Columbia still had such laws. By the time *Lawrence* was decided, twelve more states had repealed their sodomy laws.

163. *Id.* at 572.

164. *Id.* at 572–73.

165. *Id.* at 576.

and to the stability of the law," it found stare decisis to not be "an inexorable command."[166] Rather, it stated:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[167]

The Court defined the issue in *Lawrence* as "whether the majority may use the power of the State to enforce these [moral] views on the whole society through operation of the criminal law,"[168] and it opined, "'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[169] In fact, however, the Court *did* mandate for all its own independent conception of constitutionally protected sexual liberty, relying on "the substantive reach of liberty"[170] it discerned directly in the Fourteenth Amendment and on its independent appreciation of values wider than those in American law. In doing so, the Court made clear that attempts by the majority of the people "to enforce [its own] views on the whole society"[171] by making laws that deny judicially-identified fundamental personal liberties are illegitimate abuses of power that are trumped by the Court's own right to "define the liberty of all"[172] and "to say what the law is."[173]

The *Lawrence* opinion's understanding of the judiciary's power "to say what the law is" is, however, fundamentally at odds with the understanding of that famous phrase by its author, Chief Justice Marshall,[174] and by the Framers, like Hamilton, who

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166. *Id.* at 577.
167. *Id.* at 578–79.
168. *Id.* at 571.
169. *Id.* at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).
170. *Id.* at 564.
171. *Id.* at 571.
172. *Id.* at 559.
173. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
174. Chief Justice Marshall opined in *Marbury*:

> It is emphatically the province and duty of the judicial department to say what the law is. . . .
>
> [I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, dis-

viewed judges as interpreters of the law who, "[t]o avoid an arbitrary discretion," were to be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[175] Instead, it comports with Dworkin's conception of judicial integrity as the duty of judges "to declare . . . what the basic liberties really are," and thus independently to "answer intractable, controversial, and profound questions of political morality"[176] and to make their answers binding on society.

G. Roper v. Simmons

Roper v. Simmons, in 2005, advanced the moral reading of the Constitution in a new direction.[177] I include it, even though it was decided primarily under the Eighth Amendment, not the Fourteenth, because it expands the concept of substantive due process beyond sexual and reproductive rights and because it illustrates Dworkin's contention that when the Constitution is read morally, enumerated constitutional rights collapse into moral concepts of liberty and equality of "near[ly] limitless abstraction" that should guide principled legal judgment.[178]

Again abjuring traditional legal argument, the Supreme Court held in *Roper* that the Eighth and Fourteenth Amendments bar capital punishment for persons who commit their crimes

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> regarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 177–78. Justice Marshall also opined that "the framers of the constitution contemplated that instrument[ ] as a rule for the government of *courts*, as well as of the legislature," and that "courts, as well as other departments, are bound by that instrument." *Id.* at 179–80. In both instances it is clear from the context that Marshall did not foresee the claim that the courts are absolutely free to determine the "true" content of the Constitution without reference to the rules and precedents in the positive law.

175. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 42, at 471; *see also* THE FEDERALIST No. 83 (Alexander Hamilton), *supra* note 42, at 497 ("[T]he judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority."). Hamilton also stated, "The rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from which they are derived." *Id.* at 496.

176. *See* DWORKIN, FREEDOM'S LAW, *supra* note 5, at 74.

177. Roper v. Simmons, 543 U.S. 551 (2005).

178. *See* DWORKIN, FREEDOM'S LAW, *supra* note 5, at 73.

before the age of eighteen.[179] After a gruesome recitation of the facts of the murder for which Simmons had been convicted and condemned to death, and references to two prior opinions in which the Court had relied on "'evolving standards of decency'"[180] to determine whether juvenile offenders could be sentenced to death,[181] the Court stated its method for deciding the case:

> The beginning point is a review of *objective indicia of consensus*, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction. We then must determine, *in the exercise of our own independent judgment*, whether the death penalty is a disproportionate punishment for juveniles.[182]

Even more forcefully than *Lawrence*, *Roper* announces judicial independence from traditional American jurisprudence. By the Court's own pronouncement, judges are free to determine the meaning of the Constitution by their own independent "review of objective indicia of consensus,"[183] rather than being bound by either precedent or rule.

As in *Romer* and *Lawrence*, the Court looked to "evolving" state law, foreign law, and expert opinion to support its judgment.[184] The *Roper* Court found thirty states had rejected the

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179. *Roper*, 543 U.S. at 578.

180. *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

181. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988) (barring execution of offenders under age sixteen at time crime committed); Stanford v. Kentucky, 492 U.S. 361 (1989) (upholding execution of offenders between ages of sixteen and eighteen at time crime committed), *overruled by Roper*, 543 U.S. at 578.

182. *Roper*, 543 U.S. at 564 (emphasis added).

183. *Id.*

184. By contrast, the Court had followed the traditional standard of review for determining whether punishment was "cruel and unusual" under the Eighth Amendment in *Stanford v. Kentucky*, in which it had upheld the death penalty for persons between the ages of sixteen and eighteen. The Court stated in *Stanford*, "In determining what standards have 'evolved,' . . . we have looked not to our own conceptions of decency, but to those of modern American society as a whole." *Stanford*, 492 U.S. at 369. Thus, "'first' among the 'objective indicia that reflect the public attitude toward a given sanction' are statutes passed by society's elected representatives." *Id.* at 370 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). The Court found in *Stanford* petitioners had failed to carry their "heavy burden" of proof that standards had so evolved as to render the death penalty for minors cruel and unusual. *Id.* at 373. The Court also warned that to say

> it is for *us* to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what . . . the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably

juvenile death penalty, that the penalty was infrequently used even when permitted by state law, and that there was a "trend" toward its abolition.[185] The Court also found support in common knowledge; in "the scientific and sociological studies respondent and his *amici* cite";[186] in the argument of defense counsel that the death penalty was not a deterrent";[187] in Article 37 of the United Nations Convention on the Rights of the Child, ratified by "every country in the world . . . save for the United States and Somalia";[188] in a survey of other countries;[189] and in "the overwhelming weight of international opinion."[190] The Court concluded, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[191]

Justice Scalia dissented, expressing the traditionalist view that the majority opinion in *Roper* rests on a conception of judicial integrity that is contrary to the Framers' conception of a federal judiciary "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[192] He also protested that, in *Roper*, "The Court . . . proclaims itself sole arbiter of our Nation's moral standards."[193] If so—and I believe it is so—then the moral reading of the Constitution takes us far from the traditionally honored procedural and substantive constraints of the positive law and the constitutional structure of American government. Instead, it bears out Dworkin's contentions that anyone who believes that ideally free and equal citizens *would* be guaranteed a particular individual right by a just society would likely also think the Constitution already contains that right unless (and even if) constitutional history "has decisively rejected it,"[194] and that

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contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.

Id. at 379.

185. *Roper*, 543 U.S. at 553–54.

186. *Id.* at 569.

187. *Id.* at 571.

188. *Id.* at 576.

189. *Id.* at 575–76.

190. *Id.* at 578.

191. *Id.*

192. *Id.* at 607–08 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 42, at 471).

193. *Id.* at 608 (Scalia, J., dissenting).

194. *See* DWORKIN, FREEDOM'S LAW, *supra* note 5, at 73.

judges should make that determination independently of the people.

VIII. IMPLICATIONS OF A PERFECTIONIST CONSTRUCTION OF THE CONSTITUTION

Because the moral reading of the Constitution has entered so forcefully into American constitutional jurisprudence as an alternative to traditional judicial restraint in cases that present controversial issues of morality and social justice, we should ask what the broader implications of its adoption are.

First, the moral reading of the Constitution is clearly incompatible with traditional jurisprudence that defines judicial integrity in terms of the coherence of judicial opinions with the organic body of the positive law, itself conceived of as substantively and procedurally moral. Unlike traditional jurisprudence, the moral reading confers upon the judiciary the unreviewable power to identify the true conditions of moral freedom at the behest of individual litigants and to enforce its own independent conception of the substantive requirements of true liberty and equality on American society against the will of the majority and against traditional conceptions of those requirements. The moral reading thus shifts from the people to the judiciary the powers to define the empirical limits of personal liberty and equality, to restrain personal and collective liberty in accordance with its own conception of the common good, and to make general laws that further its conception of the common good, rendering the Tenth Amendment police power, the Fourteenth Amendment power of Congress to enforce the provisions in the amendment, and the Article V power of the people to amend the Constitution nugatory or, at best, vestigial.

While traditional lawmakers make laws in an assembly of representatives of all the people, and traditional judges decide cases by reference to the positive law and the facts of particular cases, judges who read the Constitution morally act independently of the positive law and the people, and they decide broad-based "test" cases brought on behalf of interest groups. They decide these cases not by applying American precedent, standards, and rules of construction, but by applying "values we share with a wider civilization"[195] as supported by "objective indicia of consensus,"[196] not to the facts of particular cases but to the facts

195. Lawrence v. Texas, 539 U.S. 558, 576 (2003); *see supra* text accompanying note 165.

196. Roper v. Simmons, 543 U.S. 551, 564 (2005); *see supra* text accompanying note 183.

shared by the groups and individuals who seek the enforcement of "true" morality and who oppose the values embodied in the laws at issue. The judgments thus reached are not incremental additions to the positive law, confined to the facts and the law of particular cases, but sweeping general pronouncements capable of invalidating a broad swath of laws based only upon the independent moral judgment of the judges themselves. And just as judges may, at will, write into the Constitution their own conception of the law, so they may write out their predecessors' conceptions.

The adoption of the conception of judges as empowered to identify and protect "fundamental," substantive moral liberties means that if a court identifies a fundamental personal right of sexual liberty, for example, any societal constraint on that liberty is constitutionally suspect, no matter how persuasive the sources of general information upon which the people relied in making the law, no matter how conducive the regulation is to the common good in the people's estimation, and no matter how deeply the traditional constraints on the expression of that personal right are embedded in American culture and law. The moral reading of the Constitution also affects the reliability of precedent and rules of construction as guides to the constitutionality of the law in the area of rights, as the Supreme Court itself acknowledged in *Lawrence*,[197] undermining the integrity and predictive force of the law in this area. Indeed, each constraint on the liberty of moral self-determination is subject to constitutional challenge, and the only laws that can survive are those that guarantee the liberties the courts *independently* determine are rationally implied by the moral concepts of liberty and equality and whose boundaries they likewise independently determine.

The logical extension of a fundamental right of sexual liberty, for example, to rapists, pornographers, polygamists, or persons who commit incest, even against the will of the majority, which the moral reading of the Due Process Clause implies, presents a challenge when courts are asked to invalidate a general law as unconstitutional. This challenge can be met only by judges asking themselves the question, "Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?"—exactly the same test of the limits of fundamental rights proposed by the

197. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003); *see also supra* text accompanying note 165.

Lochner Court.[198] And the answer to this question for the judiciary can come only from "objective indicia of consensus" as expressed by the expert opinion of moral and political philosophers and other authorities the courts choose to rely upon, since the question is not asked when precedent and tradition affirm the existence of a personal liberty. The result is necessarily that as the judiciary expands upon fundamental rights without reference to enumerated, substantive constitutional principles or to time-honored precepts and precedents the right of the people to determine for themselves the conditions of a just society proportionately diminishes.

In the philosophical and political tradition underlying the moral reading of the Constitution, the personal liberty protected by the Constitution is not the democratic liberty of the people to construct equally through their elected representatives the laws by which they consent to be governed according to majority conceptions of the common good. It is, instead, the liberty of minority groups and individuals to seek from the courts recognition and enforcement not only of a right to privacy and of constitutionally-enumerated and traditionally affirmed substantive liberties to which the people have assented, but also of substantive moral liberties traditionally proscribed as contrary to the common good, and to assert *these* liberties as grounds for the judicial invalidation of laws made by the people. The moral reading of the Constitution thus rejects the political and moral authority of the people to make those laws through their legislative representatives that they themselves deem most conducive to their own common good.

Because the moral reading of the Constitution necessarily, and firmly, rejects the majoritarian premise in determining the empirical boundaries of equal protection and personal liberty lawmaking, substituting the will of the judiciary, as ultimately expressed by a majority of the Supreme Court, for that of a majority of the people, as expressed in the positive law, as the moral arbiter of society. We should ask, therefore, before we accept the moral reading with all of its implications, why the Framers insisted that the will of the majority, and not that of unelected sages, determine fairness and the common good. In traditional jurisprudential terms, we should ask why the Framers believed that the identification and regulation of substantive personal liberties should be left to legislatures, except insofar as laws infringe constitutionally-enumerated liberties or invade tradi-

198. Lochner v. New York, 198 U.S. 45, 56 (1905); *see also supra* text accompanying note 66.

tionally protected rights and privileges, and should not be conferred on an independent judiciary with final, unfettered authority to say what the law is. Why did the Framers not expressly protect the individual members of society against the moral majority?

Madison argued in *The Federalist* that there were only two methods for providing against the evil of a majority united against a minority: (1) "by creating a will in the community independent of the [will of the] majority—that is, of the society itself," and (2) "by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable."[199] Because he considered the former "at best . . . but a precarious security," Madison favored the creation of a federal republic in which, though all authority derives from society, the society is "broken into so many parts, interests, and classes of citizens that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."[200] For him, "[i]n a free government, the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."[201] Madison explained,

> In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself.[202]

A government of free people by and for themselves is, as the Framers understood, the opposite of a society that assigns the security for moral rights to the State as an entity whose will is independent of, and superior to, the will of the people, even a State embodied in a rational and beneficent judiciary. Thus, judicial assumption of the power to define, and to enforce as fundamental, liberties that are not embedded in the Constitution or traditionally protected as essential to privacy or ordered liberty

199. THE FEDERALIST NO. 51 (James Madison), *supra* note 42, at 323–24.
200. *Id.*
201. *Id.*
202. *Id.* at 325.

not only violates traditional American jurisprudence and the laws and structures promulgated by the American people to express and protect their own conception of the public good, but it also violates the original moral and political concept upon which the United States was founded—the right of free and equal citizens to make those laws for their own governance that they themselves believe most conducive to their own common good. Even more profoundly, the concept of the courts as the final independent authority on morality, empowered to override any legislation they independently deem morally invalid, violates the concept of respect for the moral autonomy of the actual persons who make up society, which directly implies their right to make for themselves those laws to which they would willingly subject themselves, subject only to the fundamental principles of substantive and procedural fairness they themselves have built into the law.

The genius of American constitutional government is precisely that it maintains the moral autonomy of the individual on the societal scale while simultaneously respecting and protecting personal moral autonomy within the sphere of private actions and relationships. Public moral decisions are made and embedded in the positive law through the collective decisions of representatives of the people, acting on behalf of the people and with their consent, subject only to the constraints of those procedural and substantive liberties enumerated in the Constitution, as set out in its plain language and interpreted over time in statutes and case law. Respect for personal moral autonomy, or liberty, and for the intrinsic equal worth of every individual, is never lost in the self-creating, self-sustaining, self-correcting democratic conception of the just society; it is never submerged in the superior will of the rational self as an entity apart from the people, whether in the form of a legislative body or of the courts; it is built into the procedural and substantive guarantees in the Constitution, including those of Equal Protection and Due Process. Yet it is exactly this concept of the moral autonomy of the people that the moral reading of the Constitution rejects—locating moral autonomy, instead, in an independent judiciary acting as sages on behalf of individuals and in their "true" best interest to secure the conditions of liberty and equality from infringement by the people themselves.

Nevertheless, we should still ask whether traditional jurisprudence can meet the challenge posed by the moral reading of the Constitution by satisfactorily resolving the constitutional issues of morality and social justice presented by legal cases while respecting the requirements of both moral principle and law, or whether social evils of discrimination or the infringement of per-

sonal liberty—especially those directed against minorities—can be corrected, in fact, only by a wise and beneficent judiciary with the independent authority to say what the law is.

IX. THE PERFECTIONIST CHALLENGE TO TRADITIONAL JURISPRUDENCE

Why, we may ask, should not the moral judgments of the majority, as expressed in state or federal laws, be overridden by the courts if the people are wrong, as shown by right reason, or by trends in the law, or by the opinions of experts, or by the views of other persons elsewhere? How can morally bad law be repudiated unless the judiciary takes the moral high ground and the lead? Second, and very importantly, how else can the rights of minorities and "unpopular" classes be protected? Third, if the Constitution does protect a moral right to equality or a fundamental due process liberty interest that encompasses both a privacy interest and a fundamental right of moral self-determination, how can these rights and liberties be judicially recognized and protected by traditional jurists relying on the positive law and the facts of particular cases as their only guide? Is not the moral reading of the Constitution necessary to identify and enforce these rights? And, finally, how can judges decide novel questions of law presented by cases in areas of moral disagreement in a diverse and evolving society without making new law based on their own best assessment of the requirements of morality?

A. *The Invalidation of Morally Bad Law*

First, a critical fact, often overlooked, is that the Constitution expressly protects from governmental intrusion the substantive moral liberties enumerated in it, including, for example, the right to free expression of religion, the right to freedom of speech, the right to assembly and petition for redress of grievances, the right to freedom from unreasonable searches and seizures, and the right to freedom from racial discrimination. It also protects truly private actions and traditionally protected inter-personal liberties. If a state law violates these fundamental substantive liberties, either facially or as applied, that law will be invalidated by traditional jurists as unconstitutional, and if not, not.[203] The Constitution also provides fundamental procedural safeguards against the deprivation of life, liberty, or property

203. A law may not be "facially unconstitutional," that is, unconstitutional in all applications, but may nevertheless be unconstitutional as applied. *See* United States v. Salerno, 481 U.S. 739, 745 (1987).

without due process of law and against unequal treatment of "unpopular" minorities, *vis-à-vis* other similarly situated persons. Thus, for example, laws that are not otherwise unconstitutional, but that treat materially similarly situated persons unequally, or that lack a rational relationship to a legitimate state purpose, will be invalidated by traditional jurists, as well as by jurists who read the Constitution morally.

Second—and again, often overlooked—the positive law is *self-correcting*. Local, state, and national laws and judicial opinions that violate constitutionally protected rights may be overturned under the substantive provisions in the Bill of Rights as well as under constitutional principles enunciated in the Ninth, Tenth, and Fourteenth Amendments, without judges reading these provisions in terms of their own understanding of morality.

To the extent a law does not violate constitutionally enumerated or traditionally respected liberties, however, a traditionalist would hold that the people are free to write into the law the values they deem most conducive to their own common safety and happiness without fear that an independently minded judiciary will invalidate those laws. Thus, the positive law is free to evolve in state legislatures and in Congress as the people become persuaded that the laws need revising because their substantive moral and intellectual underpinnings have been eroded by changing circumstances and perspectives. Additionally, traditional jurists will respect and enforce the moral principles and rights democratically embedded in the evolving positive law without relying upon those evolving, subordinate laws as authority for reading into the Constitution fundamental, substantive liberties that trump all inconsistent laws, no matter how deeply embedded in the traditions and laws of the people.

B. *The Protection of Minority Rights and "Unpopular" Moral Views*

But should not the rights of "unpopular" moral minorities be protected by appeal to the courts' informed understanding of the requirements of morality when the laws approved by the majority disagree with right reason or with the shared values of a wider civilization or shock the conscience? How can the rights of minorities be protected if the majority rules?

First, minority points of view are protected in all of the ways just mentioned. Second, traditional jurists recognize that public conceptions of morality do evolve, and that evolving conceptions of morality have brought about not only amendments to the Constitution itself but also the great Civil Rights Acts of 1960,

1964, and 1968 and laws granting civil protections to homosexuals, prohibiting the execution of minors, and pursuing other goals a majority of Americans in relevant communities have come to deem fundamental to a well-ordered and beneficent society in changing times and circumstances. Traditional jurists have consistently upheld the constitutionality of *these* laws as within the power of the states or Congress to enact so long as they do not violate express procedural or substantive constitutional guarantees. Indeed, traditional jurists would assert that American law assigns the power to make general laws to legislatures, not to courts, and that it accords greater weight to public laws of general application than to judicial decisions, not the other way around, precisely because the Framers of the Constitution believed that process more protective of the interests of *all* citizens, including minorities, and the American people have not restructured the Constitution to provide otherwise.

On a traditionalist view, when no enumerated constitutional right, or traditionally respected substantive liberty, or procedural violation, controls a question, there is no obvious justification compatible with the Constitution for the courts to cut off the debate of the American people as to how best to structure society for the good of all—a debate both traditionally and constitutionally assigned to legislatures, with their superior access to information and accountability to all the people, or to constitutional conventions when of adequate gravity. To decide otherwise is to decree the tyranny of *minority* views of social morality and to isolate that tyranny from the scrutiny of the people in the marketplace of ideas.

C. *The Protection of Personal Liberty*

But the question still remains of *how* adherence to traditional jurisprudence can ensure that government does not intrude upon our private lives or purely personal moral decision making, and *how* it can ensure the protection of non-enumerated liberties traditionally deemed fundamental to ordered liberty *without* the courts defining the substantive moral rights intruded upon or worthy of protection, such as a right to sexual freedom, and, in so doing, recognizing new, substantive constitutional liberties with life and substance of their own. This, I believe, is the hardest question for traditional jurisprudence. It is answered by the recognition that both privacy and the people's constitutional right to constrain the social expression of moral values within the bounds they themselves deem fundamental to ordered liberty are protected only when judges confine their identification of pri-

vacy rights to choices that are truly personal and private and to traditionally respected personal liberties, as they are presented in particular cases, respecting the right of the people to define and redefine through legislation, within express constitutional constraints, the boundaries of self-determination when personal expression becomes interpersonal and a societal arbiter is required, i.e., when a sufficient empirical moral nexus arises.

Traditional and non-traditional jurists can agree that when people's personal moral interests within the zone of privacy are at stake—i.e., when truly private behavior is at stake that does not interfere with the rights of others or with a regulative scheme rationally deemed conducive to the public good—we do not expect government to tell us what to do, or to decide what society's view of "right" reason or "true" morality or justice requires. However, personal moral concerns become social concerns when they are invoked to limit the moral or legal rights of others, or when they otherwise affect the common good, presenting a nexus of empirical moral concern that requires an arbiter, whether private or public, to order the liberties we exercise against each other. Thus, the first step for courts in determining where to draw the line between judicially protected, truly personal moral decisions and moral matters of public concern subject to state regulation is to ask where the spheres of purely private moral concern and public moral concern intersect. And, for those boundaries, traditional jurists look to tradition and to rules and standards as embodied in the positive law rather than making an independent assessment of the rational requirements of morality, or public health, or safety, or welfare, and using that as a touchstone to invalidate state laws.

For example, when a person decides not to continue his own chemotherapy for a deadly cancer, the right asserted is a personal, moral liberty, or a right to make a private, moral decision, that is firmly protected from State interference by the Ninth, Tenth, and Fourteenth Amendments. Neither legislatures nor courts have traditionally intruded into this area of personal, moral decision making. But when a parent stops chemotherapy for her toddler against the wishes of the other parent and against medical advice that the treatment is necessary to save the child's life, or when one relative seeks to continue life support and another refuses, a nexus of empirical moral concern is presented in which an arbiter is required. If the matter cannot be privately resolved, and particularly if the problem is recurrent, the power of the State may be invoked to resolve it through the courts or through legislation. The asserted moral right, or liberty, then becomes a publicly enforceable positive legal right that takes its

place within the body of the positive law that society maintains to advance its collective conception of human dignity and moral autonomy. So long as the enforcement of that right violates no procedural or substantive law, it should be constitutionally sound.

D. *The Resolution of Novel Questions of Law*

But what of legal cases that present novel moral issues? How can judges not answer these questions morally? First, many of the controversial moral questions that perfectionists contend evade resolution within the positive law are not novel, and their resolution demonstrably does not require extraordinary recourse to the courts, as shown by the cases addressed above. However, some cases genuinely do present novel moral issues. These are cases in which there is no positive law on point or in which the law being tested is a new one in a developing area.

Take, for example, the novel moral and legal problems raised by human cloning, or by personal decisions to create and provide human embryos or fetuses for scientific experimentation, or by the combination of human genes with animal genes to create hybrids or organ farms, or by the disposition at divorce of cryogenically frozen embryos created by in vitro fertilization, or by the bearing of children by surrogate mothers, or by the use of fertilization procedures to create children for homosexual partners, or by the custody of children when partners in legally unrecognized situations forsake each other. These matters are not always amenable to private resolution; nor, arguably, should they be left to such resolution, since they directly and indirectly affect the differing moral interests of different persons and an entire body of social arrangements requiring the regularity of law in the interest of the community as a whole. For example, fertility clinics need guidelines for the disposition of frozen embryos when their clients divorce; surrogate mothers need assurance of their legal rights in different circumstances, or the assurance that they have none; and unmarried sexual partners, whether homosexual or heterosexual, need assurances as to the legal rights they likewise do and do not have with respect to the custody of children.

Law is just being made in these areas. How should it be made when a legal case involving moral disagreement that affects interpersonal rights presents itself and the legislature has not acted? Again, one possible approach—compatible with the moral reading of the Constitution—is for the courts to define and enforce as fundamental those substantive liberties they indepen-

dently determine are implied by the moral concept of liberty embedded in the Due Process Clause—liberties such as the right to sexual freedom, or the right to reproductive freedom, or the right to moral non-discrimination—and to balance these "fundamental rights" against enumerated constitutional rights and state interests the courts independently deem "compelling." In other words, the courts could take the substantive due process approach that *Lochner* and *Lawrence* both exemplify. But there are problems with this approach, and there is no need to adopt it.

Take the hypothetical case where a law banning human cloning has reached the Supreme Court because someone wishes to clone an embryo to extract stem cells to cure his disease. Should the law be invalidated on the ground it interferes with a broad, fundamental positive right to the integrity of one's body or to reproductive freedom? If so, what happens when a wife wants to clone her own child and her husband does not want her to do it? Does this same general right of self-determination in sexual or reproductive matters apply? If not, why not? How about the husband's implied fundamental right *not* to become a parent? And does the Court then need to balance the reproductive rights of the potential legal (if not physical) parents of the cloned embryo? Where does the balancing stop? These are questions for philosophers. A traditional jurist would say they are also questions for legislators, who are in a much better position than judges to assess *all* of the factors relevant to the situation in which a general rule is sought, to determine *all* of the interests affected (not just those of parties to a legal case), and to assess *all* of the foreseeable effects of a potential general rule on affected interests.

Traditional judges do not seek to maintain the moral and legal integrity of the law by deriving fundamental, substantive legal rights from abstract moral principles, unilaterally defining their boundaries, and enforcing them as broad substantive principles according to their own "constructive interpretation" of the best legal practices of the community,[204] constraining the right of the people to make their own laws in the interest of assuring the "true" liberty and equality of all. They confine the exercise of their constructive or interpretive judgment to the relevant law and the facts of particular cases. They first identify the problem presented by a case or controversy. If constitutional or statutory law is applicable, they apply it as interpreted in the positive law; or, if the law is challenged as unconstitutional, facially or as

204. *See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 225.

applied, they determine whether it is indeed unconstitutional under traditional criteria, and they invalidate it if it conflicts with enumerated constitutional principles or intrudes upon privacy or traditionally affirmed personal liberties. If there is no controlling constitutional or statutory law, or if the law is unsettled, or if it has not been previously interpreted, traditional judges look to procedural rules, rules of construction, and past decisions in analogous cases for guidance. With recourse to the courts to resolve the conflict, an otherwise private moral controversy becomes a legal controversy entailing a judgment that enters the body of accrued positive case law, which remains flexible and subject to future adjustment on a case-by-case basis as it awaits the development of a sufficient empirical need for a uniform general law to generate legislative action—at which point refinement through judicial interpretation in particular cases begins anew.

Perfectionism is neither necessary nor efficacious to ensure that the conditions of individual liberty and equality essential to our democracy are respected and implemented. Rather, it undermines those conditions. But perfectionist decisions are not the only decisions that have defined the course of rights-based jurisprudence since *Brown* and *Griswold* were decided.

X. THE TRADITIONALIST ALTERNATIVE

While the Supreme Court has read the Fourteenth Amendment morally in a number of landmark cases over the past half century, it has also taken a traditional approach in a number of other cases, respecting both negative personal liberty, or privacy rights, and the positive liberty of the people under the Tenth and Fourteenth Amendments to define the boundaries of personal liberty through legislation in ways the people rationally deem conducive to the common good.

A. Troxel v. Granville

In *Troxel v. Granville*, for example, the Supreme Court considered a state law interpreted by the Washington Supreme Court as permitting paternal grandparents to obtain court-ordered visitation with their late son's children over the objections of the child's fit mother.[205] The *Troxel* Court held the state law was unconstitutional and invaded the fundamental due-process right of parents to make decisions as to the care, custody,

205. *Troxel v. Granville*, 530 U.S. 57 (2000).

and control of children.[206] But the Court did not attempt to define the boundaries of the fundamental right to raise one's children, leaving it to be determined in particular cases and, where the nexus of moral concern presented was sufficiently compelling to justify a new law, leaving it to the states.[207]

B. Cruzan v. Director, Missouri Department of Health

Similarly, in *Cruzan v. Director, Missouri Department of Health*, the Supreme Court considered whether Missouri had the power to determine whether a statement by Nancy Cruzan that she would not want to live in a vegetative state, made a year before an accident left her in such a state, was insufficient proof of her desire to have her hydration and nutrition withdrawn, or whether the law permitting that review infringed Cruzan's protected constitutional right to refuse life-saving medical treatment.[208] As in *Lochner*, the Court held that the question of whether a person's liberty interest under the Due Process Clause (here, in refusing unwanted medical treatment) has been invaded by a state law "must be determined by balancing the liberty interest against relevant state interests," namely, in *Cruzan*, the "general interest in the protection and preservation of human life."[209] Nevertheless, while the rationale was that of *Lochner*, the result was traditional in that the Supreme Court recognized a traditional personal liberty interest in refusing life-sustaining treatment while leaving it to the state of Missouri to determine, in the exercise of its police power, how best to protect and enforce that fundamental liberty interest when other compelling state interests, i.e., interpersonal interests requiring the regularity of law, were affected by its enforcement.[210]

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206. *Id.* at 72.

207. *See id.* at 72–73. States have regulated the right to rear one's children, for instance, when parents place their children in grave and immediate danger or when parents divorce and their interests in their children conflict, and those laws have generally not been challenged for their constitutionality or have been upheld when challenged.

208. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 285 (1990).

209. *Id.* at 262. A traditionalist court would have determined whether the right was a traditionally respected privacy right (it was) and whether the law was rationally related to the protection of that right and did not infringe other protected rights.

210. *See id.* at 287. Twelve years before *Cruzan*, the Supreme Court applied a *Lochner*-type balancing test to the right to marry, which it held to be "one of the vital personal rights essential to the orderly pursuit of happiness by free men" that are protected by the Due Process Clause and, since *Griswold*, have been recognized as "part of the . . . 'right of privacy.'" Zablocki v. Redhail, 434 U.S. 374, 383–84 (1978) (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)). This right was, of course, not a personal liberty protected from state

In effect, the Court recognized that the exercise of the personal moral right of a comatose patient to refuse life-sustaining care has a public aspect affecting interpersonal interests and that the orderly channeling of these interests through general state laws is appropriate to protect the rights of all interested persons, such as the unconscious patient herself, family members who might wish to continue or discontinue such treatment, and the doctors and hospital charged with her care. Since Missouri's law did not intrude upon the zone of privacy, but protected the exercise of individual moral judgment within general boundaries that did not infringe a constitutional right, the Court concluded that the determination as to what constituted legal consent to discontinue treatment was properly left to the state.

C. Washington v. Glucksberg

In *Washington v. Glucksberg*, the Supreme Court once again recognized that there are certain fundamental moral interests not enumerated as rights in the Constitution that include both a private aspect and a public aspect, and that the public aspect of those fundamental interests is subject to state regulation so long as the regulation rationally furthers common interests and does not infringe traditionally protected personal liberties.[211] Glucks-

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intrusion but a right, or privilege, traditionally regulated by religious authorities and state law.

Justice Stewart, concurring, refused to recognize "a 'right to marry' in the constitutional sense," arguing that "[t]hat right, or more accurately that privilege, is under our federal system peculiarly one to be defined and limited by state law." *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring). In other words, like Justice Goldberg in *Griswold*, Justice Stewart recognized that the Constitution protects traditional liberty interests, but he denied that the courts have the authority to identify substantive liberties as constitutionally implied and to define the boundaries of those liberties. He opined, "Although the Court purports to examine the bases for legislative classifications and to compare the treatment of legislatively defined groups, it actually erects substantive limitations on what States may do. . . . Such restrictions on basic governmental power are at the heart of substantive due process." *Id.* at 395. He would have addressed the rationality of the law in question—which prevented men who had failed to pay child support from marrying—under traditional standards of review. *See id.* at 396. Justice Powell, likewise, would have recognized that domestic relations had long been regarded "as a virtually exclusive province of the states," limited only under the Due Process Clause by a showing of governmental intrusion into "deeply rooted traditions" and under the Equal Protection Clause by the lack of a substantive relation to the objective of the legislation. *See id.* at 398–99 (Powell, J., concurring) (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)). Both would have reached the same conclusion as the majority, that the law was invalid.

211. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (recognizing rights to marry, have children, direct the education and upbringing of one's

berg had argued for the judicial recognition of a fundamental constitutional right to assisted suicide under the Due Process Clause, i.e., an enforceable, non-traditional substantive due process right embodying the positive liberty of self-determination.

The Supreme Court held that while the Due Process Clause protects the traditionally affirmed personal right to refuse unwanted lifesaving medical treatment, assisted suicide is not a traditionally recognized fundamental personal liberty interest, as shown by the fact that legislatures have consistently refused to recognize, define, and enforce such a legal right.[212] Thus, the Court recognized that the assertion of a right to legally-protected and legally-assisted suicide went beyond a demand for the recognition of a right to make private moral decisions and implicated the people's constitutional authority under the Tenth Amendment to regulate areas of interpersonal moral concern in which rights may conflict and moral views may differ. A ruling invalidating the law could not have been supported on the ground that the law violated an enumerated constitutional provision or a traditionally protected fundamental liberty, or that it invaded the zone of privacy. It could have found support only in the Court's own independent moral judgment that persons assisting suicide should be accorded the protection of law. In *Glucksberg*, the Supreme Court did *not* assert its own independent moral judgment or identify a fundamental positive right of self-determination that encompassed a right to assisted suicide.

D. Gonzales v. Carhart

In *Gonzales v. Carhart*,[213] decided in 2007, the Supreme Court revisited the fundamental constitutional right of a woman to an abortion it had recognized in *Roe v. Wade* and further refined in *Roe*'s progeny.[214] In *Gonzales*, the Court addressed the constitutionality of a law passed by Congress outlawing a late-term abortion procedure called "intact dilation and evacuation" or "partial-birth abortion," in which the fetus is partially delivered and then killed. The Court accepted as controlling the

children, maintain marital privacy, use contraception, preserve bodily integrity, and have an abortion).

212. *Id.* at 720–23.

213. Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

214. *See* Stenberg v. Carhart, 530 U.S. 914 (2000) (declaring unconstitutional a state ban on partial-birth abortions because the statute unduly burdened the woman's right to choose abortion at all); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (refining *Roe*'s trimester framework into the "undue burden" test while upholding *Roe* in the interest of stare decisis).

"three-part 'essential holding'" of *Roe*,[215] detailing the constitutional standard for regulation of the right to an abortion, but it focused on *Casey*'s premise "that the government has a legitimate and substantial interest in preserving and promoting fetal life."[216]

The Court phrased the issue in the case as whether "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[217] Using this standard, the Court conducted a traditional analysis of the Act and determined that "the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face."[218] Acknowledging that "[u]nder the principles accepted as controlling here," i.e., the principles announced in *Roe*, the Act "would be unconstitutional 'if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,'"[219] the Court determined that the Act did not "on its face impose a substantial obstacle" to the exercise of the right to late-term but pre-viability abortions, and it rejected "this further facial challenge to its validity."[220] The Court indicated that the Act could still be subject to constitutional attack as applied in "discrete and well-defined instances."[221] However, it concluded that broad facial challenges on the constitutionality of a statute impose a heavy burden on the challenger that was not met.[222] The dissent passionately disagreed with what it regarded as the Court's refusal to take seriously the progeny of *Roe*, in which the Court had "endeavored to provide secure guidance to '[s]tate and federal courts as well as legislatures throughout the Union,' by defining 'the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.'"[223]

Gonzales clearly presents a conundrum: what does a court of final authority—a Supreme Court—do when a fundamental sub-

215. *See supra* text accompanying notes 132–38.
216. *Gonzales*, 127 S. Ct. at 1626.
217. *Id.* at 1627 (quoting *Casey*, 505 U.S. at 877).
218. *Id.*
219. *Id.* at 1632 (quoting *Casey*, 505 U.S. at 878).
220. *Id.*
221. *Id.* at 1638.
222. *Id.* at 1639.
223. *Id.* at 1640 (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 845).

stantive due process right discovered and implemented by a prior Court that has read the Constitution morally provokes ongoing resistance from both Congress and the states? Does the Court continue to reassert its authority to say what the law is and to refine and expand its guidelines to respond to each new challenge, explaining and protecting its construction of the liberties implicit in the Constitution, as the *Gonzales* dissent urged? What does a subsequent Court do if it disapproves of the moral reading of the Constitution and believes that, in discovering a right implicit in the concept of liberty and implementing that right as a fundamental constitutional right, a prior Court has invaded legislative power, but believes itself bound by the strict rules and precedents in the positive law? Or what does a subsequent Court do if it agrees that the Constitution should be read morally but thinks a substantive due process right implemented by a prior Court is *not* the best constructive interpretation of the community's legal practice and that the better course—the moral course—is to repudiate the right in the interest of a more-enlightened reading of the Constitution? Lower courts face no such dilemma: they must follow precedent. But a court of last resort does face a dilemma in which it must ask itself not only where the limits of its own power and those of the coordinate branches of government intersect, but also what the consequences are for the ongoing body of the positive law, whatever decision it makes.

XI. Conclusion: The Defense of Traditional Jurisprudence

The moral reading of the Constitution has an undeniable allure as an efficient means of reconciling differing moral views in a morally diverse society and of ensuring the rationally and morally "best" interpretation of constitutional guarantees of liberty and equality according to prevailing academic philosophy. Ultimately, however, the conception of judges as moral arbiters charged with independently implementing the requirements of a truly democratic society has serious implications for the preservation of the actual American democratic ideal of the just society as a nation of intrinsically moral laws made by the people themselves for their own governance, subject to such constraints as they themselves approve, and interpreted by just judges bound by the strict rules and precedents in the positive law. Even more profoundly, if morality consists in equal respect for the intrinsic dignity and worth of each actual person, and a just actual society is one in which respect for the personal liberty and equality of all its members as both makers and subjects of the positive law deter-

mines the outcome of legislative and judicial decisions, the moral reading of the Constitution, with its scorn for both actual democracy and the positive law, fails both as a democratic political theory and as a moral theory. It cannot, therefore, serve as a fair and rational guide to social justice.

Not only is there no need to resort to the moral reading of the Constitution to resolve legal cases that present controversial issues of morality or social justice, but it is simply not the case that the moral reading is justified as a fair and rational means of implementing the true conditions of the just democratic society contemplated by the Constitution. Nor is it the case, as those who advocate the moral reading of the Constitution argue, that traditional jurisprudence fails to provide answers to novel or "hard" questions of law that implicate morality, or that it supports the tyranny of the moral majority against unpopular moral views, or that it ignores the rights of minorities to fair and equal treatment and thus institutionalizes injustice, or that it fails to protect personal moral liberty, or that it preserves morally bad law. Traditional jurisprudence is available to resolve even those difficult cases that present the most divisive legal and moral issues in a morally diverse democratic society, like our own, and those that do present truly novel issues—and to resolve them incrementally, flexibly, and in synchronization with the morality of the people and the evolving positive law, preserving both substantive and procedural liberty and equality for all. That is its enduring strength. And that is why we should not lightly reject the traditional conception of judicial integrity or lightly adopt the moral reading of the Constitution.